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A MANUAL

OF

TRADE-MARK CASES.

COMPRISING

SEBASTIAN'S DIGEST OF TRADE-MARK CASES,

COVERING ALL THE CASES REPORTED PRIOR TO THE YEAR 1879; TOGETHER WITH THOSE OF A LEADING CHARACTER DECIDED SINCE THAT TIME.

WITH NOTES AND REFERENCES.

BY

ROWLAND COX.

BOSTON:
HOUGHTON, MIFFLIN AND COMPANY,
The Riverside Press, Cambridge.
1881.

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1881

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The Riverside Press, Cambridge:
Printed by H. O. Houghton and Company.

RSF 23 Sept 55

PREFACE.

WHATEVER of virtue there may be in this compilation is to be credited to the intelligence and industry of the English author. The American editor has attempted only to supplement the original text, and to adapt it to the wants of the American reader. It is hoped that the work will be found to be a convenient manual, and useful, in a broader sense, as tending to assist the growth, in a right direction, of a branch of jurisprudence of constantly increasing interest and importance.

R. C.

229 BROADWAY, NEW YORK, *June* 20, 1881.

PREFACE TO SEBASTIAN'S DIGEST.

THIS work completes the design with which the author undertook his treatise on "The Law of Trade-Marks," &c.

The object aimed at in the present compilation has been to present a concise statement of the facts and decisions in all cases connected with the law of Trade-Marks and kindred topics, as ascertained by a careful comparison of all the various reports in which each case appears. It has been decided to arrange this collection of cases in chronological order, supplementing the body of the work with a full index, in preference to digesting the matter under heads, because, where the latter form of arrangement is adopted, one of two things must happen — either the bare decision on each point is given without the facts necessary to enable it to be rightly appreciated, or else the facts have to be repeated on each mention of the case; besides which, the connection between the points decided in the case is obscured, and points on which the case is only incidentally useful escape notice altogether. It is hoped that the Index may supply a sufficient guide to the contents of the book.

The present volume contains cases decided in the courts of all the English-speaking countries. But it has not been thought advisable to extend the scope of the book so as to include decisions of the courts of other countries, since, apart from the difference in language, the principles by which the Courts of France, Germany, &c. are governed are entirely independent of those recognized in the Courts of the United Kingdom and the United States.

A number of cases hitherto unreported, decided principally

under the recent Registration Acts, are contained in this volume, taken sometimes from the *Times* or the author's own notes, but generally from the shorthand notes, for the use of which the author desires to express his thanks to the authorities at the Trade-Marks Registry Office. In a few instances the existing reports have been supplemented from the same sources. All the places in which each case is reported, so far as could be ascertained, are given. The English cases are brought down to the Easter Vacation, 1879; the cases from other courts as nearly to that date as was practicable. It should be mentioned that a few of the more recent decisions are under appeal.

In some instances statements of the law on various points by learned judges, intended to be of general application, are appended to the cases in which they were made, and it is hoped that these extracts may be found useful.

L. B. S.

2 New Square, Lincoln's Inn, *May*, 1879.

TABLE OF CASES.

The numbers refer to the numbers of the cases.

A.

Abbott *v.* Bakers' and Confectioners' Tea Association (Limited) 379
Adams, Williams *v.* 662
Ainsworth *v.* Bentley 259
v. Walmsley 257
Albert (Prince) *v.* Strange 98
Aleploglu, Gout *v.* 51
Alexander, Jurgensen *v.* 211
Alleghany Fertilizer Co. *v.* Woodside 364
Allen, Kinney *v.* 557
Osgood *v.* 410
Wamsutta Mills *v.* 660
Allsopp *v.* Walker 545
Alvord, Newman *v.* 282
American Grocer Publishing Association *v.* Grocer Publishing Co. 503
American Leather Cloth Co. (Limited), Leather Cloth Co. (Limited) *v.* 223
American Lubricating Oil Co. *In re* 486
American Sardine Co. *In re* 422
Amoskeag Manufacturing Co. *v.* Garner (1) 314
(2) 500
Amoskeag Manufacturing Co. *v.* Spear 100
Anchor Tube Co., Selby *v.* 566
Anderson, Hostetter *v.* 652
Andrews, Sherwood *v.* 263
Anglo-Swiss Condensed Milk Co. *v.* Swiss Condensed Milk Co. 370
Ansell *v.* Gaubert 163
Apollinaris Co. (Limited) *v.* Edwards 509
Apollinaris Co. (Limited), Fisher & Co. *v.* 457
Apollinaris Co. (Limited) *v.* Moore 675
Apollinaris Co. (Limited) *v.* Norrish 465
Archbold *v.* Sweet 49
Ardley, R. *v.* 349
Armistead, Blackwell *v.* 392
v. Blackwell 399
Army and Navy Coöperative Society (Limited) *v.* Junior Army and Navy Stores (Limited) 640
Atkins, Schweitzer *v.* 298
Atkinson, *In re* 596
Aubin *v.* Holt 135
Austen *v.* Boys 156
Austria (Emperor of) *v.* Day and Kossuth 197
Ayer *v.* Rushton 574

B.

Bachof, Frese *v.* (1) 484
v. (2) 603
Badger, Emerson *v.* 309
Bailey, Gardner *v.* 365
Bain *v.* Munro 588
Baird, Colladay *v.* 186
Baker, Myers *v.* 167
Shackle *v.* 13
Bakers' and Confectioners' Tea Association (Limited), Abbott *v.* 379
Balmer, Lamplough *v.* 288
Bank of London, Lawson *v.* 140
Banks *v.* Gibson 248
Barham, Power *v.* 56
Barlow, Broadhurst *v.* 411
Barnard *v.* Pillow 293

Barnett *v.* Leuchars 253
Wolfe *v.* 390
Barrows, *Ex parte* 553
In re 540
Hall *v.* 215
v. Knight 184
v. Pelsall Coal and Iron Co. 530
Basch, Kinney *v.* 542
Bass *v.* Dawber 310
Bassett, M'Andrew *v.* 234
Batty *v.* Hill 218
Baxter *v.* Conolly 32
Société Anonyme des Mines et Fonderies de Zinc de la Vieille Montagne *v.* 559
Beachim, Braham *v.* (1) 599
(2) 633
Beard *v.* Turner 251
Bedford, Bury *v.* 222
Beeton, Bradbury *v.* 320
Ward *v.* 450
Belcher, M'Intyre *v* 220
Bell *v.* Locke 65
Bell & Co., Bell, Black & Co. *v.* 514
Bemis, Taylor *v.* 231
Benbow, Edmonds *v.* 33
Bennett, Hudson *v.* 261
Bentall, Ransome *v.* 53
Bentley, Ainsworth *v.* 259
Berger, Samuel *v.* 143
Berndes, Hinrichs *v.* 594
Bevill, Thornbury *v.* 71
Billings, Marsh *v.* 111
Binning, Day *v.* 47
Binninger *v.* Wattles 240
Blackman, Filkins *v.* 502
Blackwell *v.* Armistead 392
Armistead *v.* 399
v. Crabb 274
v. Dibrell 590
v. Wright 466
Blakeslee & Co. *In re* 376
Blanchard *v.* Hill 2
Blanford, Willett *v.* 70
Block & Co. *In re* 584
Blofeld *v.* Payne 50
Bloomer, Bloss *v.* 146
Bloss *v.* Bloomer 146
Boardman *v.* Meriden Britannia Co. 302
Boehm & Co. *In re* 470
Bohmer, Duwel *v.* 613
Bolles, Fenn *v.* 166
Bolton, Kinahan *v.* 228
Bolton, Singleton *v.* 4
Bond *v.* Milbourn 383
Boon *v.* Moss 576
Booth *v.* Jarrett 524
Bostwick, Lockwood *v.* 319
Bothin, Taylor *v.* 664
Boulnois *v.* Peake 294
Bowker, Carver *v.* 581
Bowman *v.* Floyd 201
Boyington, Tucker Manufacturing Co. *v.* 474
Boys, Austen *v.* 156
Bozon *v.* Farlow 22
Bradbury *v.* Beeton 320
v. Dickens 173
Bradley, Coe *v.* 489
v. Norton 250
Braham *v.* Beachim (1) 599
(2) 633
v. Bustard 226
Brain, Purser *v.* 92
Brakell, Schiele *v.* 219
Bramble, Wilkins & Co., Marcovitch *v.* 595
Brandreth, *In re* 626
Braun, Witthaus *v.* 492
Brebner, *In re* 649
Breidenbach, Rowland *v.* 686
Brewster, Constable & Co. *v.* 39
Brill, Singer Man. Co. *v.* 672
Broadhurst *v.* Barlow 411
Brook, *In re* 622
v. Evans 190
Brooklyn White Lead Co. *v.* Masury 154
Broughton *v.* Broughton 451
Brown, Collins Co. *v.* 151
v. Mercer 435
Browne *v.* Freeman (1) 230
(2) 424
Brownrigg, Day *v.* 631
Brunton, Coffeen *v.* (1) 99
(2) 109
Bryan, Curtis *v.* 291
R *v.* 147
Bryson *v.* Whitehead 36
Bulloch, Lade & Co. *v.* Gray 452
Bullock *v.* Chapman 95
Reynolds *v.* 615
Bulmer, Rolt *v.* 614
Bunn *v.* Guy 11
Burfield *v.* Rouch 208
Burgess *v.* Burgess 117
v. Hately 169
v. Hills 170
Burke *v.* Cassin 415

Burke, Wolfe *v.* 434
Burnett *v.* Phalon 277
Burrows *v.* Foster 207
Bury *v.* Bedford 222
Burys & Co. *In re* 643
Bush & Co. *In re* 506
Bustard, Braham *v.* 226
Byass *v.* Sullivan 188
Byles, Kelly *v.* 661
Byron (Lord) *v.* Johnston 23

C.

Campbell, Charleson *v.* 520
v. Hollins 548
Candee, Swan & Co. *v.* Deere & Co. 339
Canham *v.* Jones 19
Carbon Metallic Paint Co., Prince Metallic Paint Co. *v.* 573
Carlan, Stone *v.* 104
Carlier, Rillet *v.* 334
Carlile, Cartier *v.* 204
Carmichel *v.* Latimer 521
Carnrick *v.* Morson 543
Carpenter, Taylor *v.* (1) 78
(2) 83
(3) 84
Carroll *v.* Ertheiler 669
Carter, R. *v.* 287
Cartier *v.* Carlile 204
v. May 200
v. Westhead 199
Carver *v.* Bowker 581
v. Pinto Leite 356
Case, Morrison *v.* 394
Cassin, Burke *v.* 415
Caswell *v.* Davis 289
Cathery, Farina *v.* 275
Cave *v.* Myers 304
Chadsey, Genin *v.* 330
Chance *v.* Sheppard 317
Chandler, Cocks *v.* 351
Chapman, Bullock *v.* 95
Chappell *v.* Davidson 136
v. Sheard 132
Charbonnel, Robineau *v.* 498
Charleson *v.* Campbell 520
Chase *v.* Mayo 523
Cheavin *v.* Walker 528
Chissum *v.* Dewes 45
Chooneeloll Mullick, Orr Ewing *v.* 241
Choynski *v.* Cohen 336
Christie *v.* Christie 414
Christy *v.* Murphy 137
Chubb *v.* Griffiths 255
Churton *v.* Douglas 172
Clark *v.* Clark 148
Delaware and Hudson Canal Co. *v.* 327
v. Freeman 93
v. Leach 210
Clarke, Spottiswoode *v.* 85
Wylam *v.* 488
Clemens *v.* Such 429
Clement *v.* Maddick 174
Clements, Shipwright *v.* 350
Closs, R. *v.* 155
Clowes *v.* Hogg 345
Clybouw, Moet *v.* 533
Clyde, Winsor *v.* 396
Coats *v.* Holbrook 79
Cocks *v.* Chandler 351
Coe *v.* Bradley 489
Coffeen *v.* Brunton (1) 99
(2) 109
Coggin, Kidder & Co. *In re* 490
Cohen, Choynski *v.* 336
Coker, Hitchcock *v.* 58
Cole, Popham *v.* 425
Colladay *v.* Baird 186
Collender, Phelan *v.* 479
Collingridge, Cook *v.* 37
Collins, Crawshay *v.* 14
Collins Co. *v.* Brown 151
v. Cowen 152
v. Reeves 164
v. Walker 171
Colman *v.* Crump 579
Colonial Life Assurance Co. *v.* Home & Colonial Assurance Co. (Limited) 236
Colton *v.* Thomas 305
Commissioners of Inland Revenue, Potter *v.* 128
Comstock *v.* White 180
Condy *v.* Mitchell 561
Congress & Empire Spring Co. *v.* High Rock Congress Spring Co. 354
Connell *v.* Reed 670
Conolly, Baxter *v.* 32
Consolidated Fruit Jar Co. *In re* 578
Consolidated Fruit Jar Co. *v.* Dorflinger 444
Consolidated Fruit Jar Co. *v.* Thomas 665
Constable & Co. *v.* Brewster 39
Cook *v.* Collingridge 37

Cook *v.* Starkweather 395
Cooper, Hennessy *v.* 549
v. Hood 168
v. Watson 5
Cope, Dakin *v.* 43
v. Evans 433
Corcoran, Witt *v.* 423
Corns *v.* Griffiths 420
Cornwall, *In re* (1) 563
(2) 565
Cornwell, Morse *v.* 445
Correspondent Newspaper Co. *v.* Saunders 246
Corwin *v.* Daly 187
Coslake *v.* Till 42
Cotton *v.* Gillard 447
Couston, Moet *v.* 235
Cowen, Collins Co. *v.* 152
Crabb, Blackwell *v.* 274
Crawshay *v.* Collins 14
v. Thompson 72
Croft *v.* Day (1) 76
(2) 77
Crookes *v.* Petter 181
Crowley, Walton *v.* 138
Crump, Colman *v.* 579
Cruttwell *v.* Lye 17
Cumston, Hallett *v.* 391
Curling, England *v.* 75
Currie, Wotherspoon *v.* 329
Curtis *v.* Bryan 291
Cutter, Hardy *v.* 427

D.

Dakin *v.* Cope 43
Dale *v.* Smithson 195
Daly, Corwin *v.* 187
Isaacs *v.* 440
Darbey *v.* Whitaker 153
Darley, Hagg *v.* 604
Davidson, Chappell *v.* 136
Davies, Dawes *v.* 426
v. Hodgson 158
Davis, Caswell *v.* 289
v. Kendall 103
v. Kennedy 281
Davol Mills, Ferguson *v.* 307
Dawber, Bass *v.* 310
Dawes *v.* Davies 426
Dawes & Fanning, *Ex parte* 382
Dawson, Labouchere *v.* 385
Day *v.* Binning 47
v. Brownrigg 631
Croft *v.* (1) 76
(2) 77
Day *v.* Day 21
Day & Kossuth, Austria (Emperor of) *v.* 197
Dayton *v.* Wilkes 178
De Conto, Stephens *v.* 295
Decker *v.* Decker 525
Deere & Co., Candee, Swan & Co. *v.* 339
Deiz *v.* Lamb 266
Del Valle *v.* Mayer 326
Delaware and Hudson Canal Co. *v.* Clark 327
Delondre *v.* Shaw 44
Dence *v.* Mason (1) 534
(2) 570
Denham, Hirst *v.* 400
Denicke, Reeves *v.* 368
Dent *v.* Turpin 196
Derringer *v.* Plate 249
Devlin *v.* Devlin 463
Dewes, Chissum *v.* 45
Dey, Swift *v.* 245
Diaper, Orr *v.* 519
Dibrell, Blackwell *v.* 590
Dick & Co. *In re* 493
Dickens, Bradbury *v.* 173
Dicks, Weldon *v.* 638
Dickson *v.* McMaster & Co. 260
Dixon *v.* Fawcus 194
v. Holden 311
v. Jackson 271
Dixon Crucible Co. *v.* Guggenheim 331
Dobell, Newling *v.* 303
Dole Brothers, *In re* 577
Dorflinger, Consolidated Fruit Jar Co. *v.* 444
Dougherty *v.* Van Nostrand 64
Douglas, Churton *v.* 172
Hammond *v.* 9
Downman, Motley *v.* 61
Downs, England *v.* 74
Drat, Ward *v.* 607
Du Boulay *v.* Du Boulay 312
Dunbar *v.* Glenn 529
Duncan, Hoffman *v.* 122
Dundas, R. *v.* 120
D'Utassey, Faber *v.* 355
Dutcher Temple Co. *In re* 371
Duwel *v.* Bohmer 613

E.

Eagle Pencil Co. *In re* 522
Easterbrook, Saxby *v.* 606
Ede Bros. & Co. *Ex parte* 632

Edelsten *v.* Edelsten 213
v. Vick 119
Edgington *v.* Edgington 237
Edinburgh Correspondent Newspaper, *In re* 34
Edmonds *v.* Benbow 33
Edwards, Apollinaris Co. *v.* 509
Ehlers, Siegert *v.* 432
Eichele, Peltz *v.* 485
Elkan, Upmann *v.* 369
Ellinger & Co., Twentsche Stoom Bleekery Goor *v.* 583
Ellis *v.* Zeilen & Co. 348
Emerson *v.* Badger 309
Emery, Mickle *v.* 495
England *v.* Curling 75
v. Downs 74
English, *In re* 342
Eno *v.* Stephens 609
Ertheiler, Carroll *v.* 669
Estcourt *v.* Estcourt Hop Essence Co. 449
Esterbrook, Gillott *v.* 269
Evans, Brook *v.* 190
Cope *v.* 433
v. Hughes 127
Turner *v.* 114
Everett, Smith *v.* 176

F.

Faber *v.* D'Utassey 355
v. Faber 278
v. Hovey 481
Falkinburg *v.* Lucy 296
Farina, *In re* (1) 592
(2) 642
(3) 654
v. Cathery 275
v. Gebhardt 118
v. Shaw 113
v. Silverlock 130
Farlow, Bozon *v.* 22
Farr *v.* Pearce 28
Fassett, Filley *v.* 313
Fawcus, Dixon *v.* 194
Featherstonhaugh *v.* Fenwick 16
Fenn *v.* Bolles 166
Fenwick, Featherstonhaugh *v.* 16
Ferguson *v.* Davol Mills 307
Fetridge *v.* Merchant 145
v. Wells 144
Field *v.* Lewis 280
Filkins *v.* Blackman 502
Filley *v.* Fassett 313
Findlater, Raggett *v.* 431
Siegert *v.* 591
Finlay, Robinson *v.* 585
Fisher, Seeley *v.* 67
Fisher & Co. (Limited) *v.* Apollinaris Co. (Limited) 457
Flanagan, Matsell *v.* 270
Flavel *v.* Harrison 116
Fleming, McLean *v.* 580
v. Newton 94
Flint, Leidersdorf *v.* 629
Floyd, Bowman *v.* 201
Folgham, Green *v.* 38
Foot *v.* Lea 107
Ford *v.* Foster 384
Foss, *Ex parte*, *In re* Baldwin 159
Foster, Burrows *v.* 207
Ford *v.* 384
v. Megevand 499
Fowle *v.* Spear 90
Fox, Millington *v.* 63
Français, Hobbs *v.* 191
Francis & Mallon, *In re* 375
Franks, Pierce *v.* 81
v. Weaver, 87
Freeman, Browne *v.* (1) 230
(2) 424
Clark *v.* 93
Frese *v.* Bachof (1) 484
(2) 603
Fullwood *v.* Fullwood (1) 421
(2) 602
Fulton *v.* Sellers 279

G.

Ganton, Lemoine *v.* 125
Gardner *v.* Bailey 365
Harrison *v.* 25
Garner, Amoskeag Manufacturing Co. *v.* (1) 314
(2) 500
Garner, Merrimack Manufacturing Co. *v.* 134
Garnhart, M'Cartney *v.* 332
Gaubert, Ansell *v.* 163
Gebhardt, Farina *v.* 118
Gee *v.* Pritchard 30
Geisendorf, Sohl *v.* 367
Genin *v.* Chadsey 330
Gibblett *v.* Read 3
Gibbs, Missouri (State of) *v.* 436
Gibson, Banks *v.* 248
Gillard, Cotton *v.* 447
Gillespie & Co. *v.* Marshall 648

Gillies, Taylor *v.* 448
Gillis *v.* Hall (1) 335
(2) 353
Gillott *v.* Esterbrook 269
v. Kettle 126
Gilman *v.* Hunnewell 541
Gladstone, Steuart *v.* 605
Glen & Hall Manufacturing Co. *v.* Hall 443
Glendon Iron Co. *v.* Uhler 439
Glenn, Dunbar *v.* 529
Glenny *v.* Smith 247
Glines, *In re* 471
Godillot, *In re* 446
v. Hazard 461
Goodyear Rubber Co. *In re* 547
Gordon, *In re* 572
Goulard, Wolfe *v.* 179
Gouraud *v.* Trust 460
Gout *v.* Aleploglu 51
Graham, *In re* 412
v. Plate 347
Graham & Co. *v.* Kerr, Dods & Co. 315
Graveley *v.* Winchester 272
Graves, Smale *v.* 102
Gray, Bulloch, Lade & Co. *v.* 452
v. Koch 363
Gray & Co., Wotherspoon & Co. *v.* 227
Gray & Gosling, R. *v.* 183
Green, *In re* 473
v. Folgham 38
v. Rooke 389
v. Shepherd 262
Griffiths, Chubb *v.* 255
Corns *v.* 420
Grillon *v.* Guénin 532
Grimshaw, *Ex parte* 535
Grocer Publishing Co., American Grocer Publishing Association *v.* 503
Grosvenor, Seabury *v.* 562
Guénin, Grillon *v.* 532
Guggenheim, Dixon Crucible Co. *v.* 331
Guinness *v.* Heap 617
v. Ullmer 89
Guy, Bunn *v.* 11

H.

Hagg *v.* Darley 604
Haley, Lee *v.* 325
Hall *v.* Barrows 215
Hall, Gillis *v.* (1) 335
(2) 353
Glen & Hall Manufacturing Co. *v.* 443
v. Hall 129
Hall and Co. *In re* 596
Hallett *v.* Cumston 391
Hammond *v.* Douglas 9
Hampshire and North Wilts Bank, London and County Banking Co. *v.* 618
Hanbury, Liebig's Extract of Meat Co. *v.* 286
Hand, Worral *v.* 6
Hankinson, *In re* 464
Hardy *v.* Cutter 427
Hargreaves, *In re* 645
v. Smith 338
Harper *v.* Pearson 193
Harrington *v.* Libby 538
Harris, Palmer *v.* 308
Harrison, Flavel *v.* 116
v. Gardner 25
v. Taylor 244
Hart, Wolfe *v.* 653
Harter *v.* Souvazoglu 454
Hately, Burgess *v.* 169
Hauthaway, *In re*, (1) 357
(2) 377
Hayward, Parsons *v.* 206
Hazard, Godillot *v.* 461
Heap, Guinness *v.* 617
Heath *v.* Wright 133
Helleley, Johnson *v.* 238
Helmbold *v.* Helmbold Manufacturing Co. 575
Hemmons, Weston *v.* 517
Henderson *v.* Jorss 198
Hendrickx, Laferme (Compagnie) *v.* 512
Henley, Rose *v.* 551
Hennessy *v.* Cooper 549
v. Hogan 651
v. Kennett 556
v. Rohmann, Osborne & Co. 531
v. Wheeler 483
v. White 650
Henriques, Howard *v.* 108
Henry *v.* Price 48
High Rock Congress Spring Co., Congress & Empire Spring Co. *v.* 354
Hill, Batty *v.* 218
Blanchard *v.* 2
Hills, Burgess *v.* 170

Hine *v.* Lart 80
Hinrichs *v.* Berndes 594
Hirsch *v.* Jonas 494
Hirschfeld, Leather Cloth Co. *v.*
(1) 214
(2) 224
(3) 252
Hirst *v.* Denham 400
Hitchcock *v.* Coker 58
Hopkins *v.* 216
Hobbs *v.* Français 191
Hodgson, Davies *v.* 158
Hoffman *v.* Duncan 122
Hogan, Hennessy *v.* 651
Hoge, Moorman *v.* 373
Hogg, Clowes *v.* 345
v. Kirby 10
Maxwell *v.* 264
v. Maxwell 265
Holbrook, Coats *v.* 79
Holden, Dixon *v.* 311
Hollins, Campbell *v.* 548
Holloway *v.* Holloway 106
Holmes, Booth & Haydens *v.* Holmes, Booth & Atwood Manufacturing Co. 340
Holt, Aubin *v.* 135
Home and Colonial Assurance Co. (Limited), Colonial Life Assurance Co. *v.* 236
Hood, Cooper *v.* 168
Hookham *v.* Pottage 398
Hoosier Drill Co. *v.* Ingels 627
Hopkins *v.* Hitchcock 216
Horn, Sawyer *v.* 667
Horsburgh, *In re* 597
Hostetter *v.* Anderson 652
v. Vowinkle 366
Houghton, Rowley *v.* 301
Hovenden *v.* Lloyd 337
Hovey, Faber *v.* 481
How, Pidding *v.* 60
Southern *v.* 1
Howard *v.* Henriques 108
Howe *v.* Howe Machine Co. 284
v. M'Kernan 203
v. Searing 185
Whittaker *v.* 66
Howe Machine Co., Howe *v.* 284
Hudson *v.* Bennett 261
v. Osborne 323
Hughes, Evans *v.* 127
Humphrey, Peterson *v.* 149
Hunnewell, Gilman *v.* 541
Hunt *v.* Maniere 239
Hunter, R. *v.* 287
Hutton, Kelly *v.* 292
Hyde & Co. *In re* 593

I.

Imbs, *In re* 518
India Rubber Comb Co. *In re* 476
v. Meyer, 475
Ingels, Hoosier Drill Co. *v.* 627
Ingram *v.* Stiff 175
Isaacs *v.* Daly 440
Isaacson *v.* Thompson 381

J.

Jackson, Dixon *v.* 271
James *v.* James 388
Newbery *v.* 24
Oldham *v.* 209
Spicer *v.* 46
Jaques, Jollie *v.* 105
Jarrett, Booth *v.* 524
Jelley, Son & Jones, *In re* 616
Jendwine *v.* Slade 8
Jenkins, Wade *v.* 192
Johnson *v.* Helleley 238
Kidd *v.* 666
Sohier *v.* 408
Williams *v.* 150
Johnson & Co. *In re* 404
Johnston, Byron (Lord) *v.* 23
Johnston & Co., Orr Ewing & Co. *v.* 646
Jollie *v.* Jaques 105
Jonas, Hirsch *v.* 494
Jones, Canham *v.* 19
R. *v.* 182
Jorss, Henderson *v.* 198
Junior Army and Navy Stores (Limited), Army and Navy Coöperative Society (Limited) *v.* 640
Jurgensen *v.* Alexander 211

K.

Kane & Co. *In re* 480
Keen, Mellersh *v.* 177
Kelly *v.* Byles 661
v. Hutton 292
Kendall, Davis *v.* 103
Kennedy, Davis *v.* 281
v. Lee 27
Kennett, Hennessy *v.* 556

Kerr, Dods & Co., Graham & Co. *v.* 315
Ketcham, Weston *v.* (1) 455
(2) 487
Kettle, Esterbrook *v.* 126
Kidd *v.* Johnson 666
Kidd & Co. *v.* Mills, Johnson & Co. 437
Kimball, *In re* 553
Kimball & Morton, Singer Manufacturing Co. *v.* 413
Kinahan *v.* Bolton 228
King, *Ex parte* 341
King & Co., Strahan & Co. *v.* 539
Kinney *v.* Allen 557
v. Basch 542
Kirby, Hogg *v.* 10
Knight, Barrows *v.* 184
Knott *v.* Morgan 57
Prudential Assurance Co. *v.* 453
Welch *v.* 157
Koch, Gray *v.* 363
Kuhn & Co. *In re* 637

L.

Labouchere *v.* Dawson 385
Laferme (Compagnie) *v.* Hendrickx 512
Laight, Shrimpton *v.* 123
Laird *v.* Wilder 418
Lamb, Deiz *v.* 266
Lamplough *v.* Balmer 288
Landgraff, Stokes *v.* 121
Langdon, Lewis *v.* 55
Larned, Lowell Manufacturing Co. *v.* 428
Larsen, Singer Man. Co. *v.* 659
Lart, Hine *v.* 80
Latimer, Carmichel *v.* 521
Lautz Bros. & Co. *v.* Schultz & Co. 496
Lawrence & Co. *Ex parte* 630
In re 504
Lawrence Man. Co. *v.* Lowell Hos. Co. 673
Lawson *v.* Bank of London 140
Lazar, Woodward *v.* 212
Lazenby *v.* Lazenby 160
v. White (1) 344
(2) 346
Lea, Foot *v.* 107
v. Millar 513
v. Wolff 407
Leach, Clark *v.* 210
Leather Cloth Co. (Limited) *v.* American Leather Cloth Co. (Limited) 223
Leather Cloth Co. (Limited) *v.* Hirschfeld (1) 214
Leather Cloth Co. (Limited) *v.* Hirschfeld (2) 224
Leather Cloth Co. (Limited) *v.* Hirschfeld (3) 252
Leather Cloth Co. (Limited) *v.* Lorsont 324
Ledger *v.* Ray 550
Lee *v.* Haley 325
Kennedy *v.* 27
Leidersdorf *v.* Flint 629
Lemoine *v.* Ganton 125
Leonardt, *In re* 610
Leuchars, Barnett *v.* 253
Levy *v.* Walker 639
Lewis, Field *v.* 280
v. Langdon 55
Libby, Harrington *v.* 538
Liebig's Extract of Meat Co. *v.* Hanbury 286
Linoleum Manufacturing Co. *v.* Nairn 536
Lisner, *In re* 600
Llewellyn *v.* Rutherford 462
Lloyd, Hovenden *v.* 337
Locke, Bell *v.* 65
Lockwood *v.* Bostwick 319
Loftus, Rose *v.* 608
London Assurance *v.* London and Westminster Assurance Corporation (Limited) 221
London and County Banking Co. *v.* Hampshire and North Wilts Bank 618
London and Provincial Joint Stock Life Assurance Co., London and Provincial Law Assurance Society *v.* 88
London and Provincial Law Assurance Society *v.* London and Provincial Joint Stock Life Assurance Co. 88
London and Westminster Assurance Corporation (Limited), London Assurance *v.* 221
Longman *v.* Tripp 12
v. Winchester 15
Loog, Singer Manufacturing Co. *v.* 635
Lorsont, Leather Cloth Co. *v.* 324
Lowell Hos. Co., Lawrence, &c. Co. *v.* 673

Lowell Manufacturing Company *v.* Larned 428
Lucy, Falkinburg *v.* 296
Lumley *v.* Wagner 112
Lye, Cruttwell *v.* 17
Lysaght, *In re* 623

M.

McAdam, Morgan *v.* 267
McAndrew *v.* Bassett 234
McBride, Procter et al. *v.* 657
McCardel *v.* Peck 233
McCartney *v.* Garnhart 332
McCormick *v.* McCubbin 35
McCubbin, McCormick *v.* 35
Macdonald *v.* Richardson 165
McGowan, McGowan Bros. Pump Machine Co. *v.* 406
McGowan Bros. Pump Machine Co. *v.* McGowan 406
McIntyre *v.* Belcher 220
McKernan, Howe *v.* 203
Mackintosh, Scott *v.* 20
McLean *v.* Fleming 580
McMaster & Co., Dickson *v.* 260
McNulty, Powell *v.* 26
Mack *v.* Petter 403
Macrae, Young *v.* 205
Maddick, Clement *v.* 174
Major, Turner *v.* 202
Manhattan Medicine Co. *v.* Wood 628
Maniere, Hunt *v.* 239
Marcovitch *v.* Bramble, Wilkins & Co. 595
Marsh *v.* Billings 111
Marshall, Gillespie & Co. *v.* 648
v. Ross 316
v. Watson 162
Martin *v.* Wright 52
Mason, Dence *v.* (1) 534
(2) 570
Smith *v.* 458
Massam *v.* J. W. Thorley's Cattle Food Co. 560, 564, 668
Masury, Brooklyn White Lead Co. *v.* 154
Matsell *v.* Flanagan 270
Maxfield, Wilson *v.* 459
Maxwell *v.* Hogg, 264
Hogg *v.* 265
May, Cartier *v.* 200
Mayer, Del Valle *v.* 326
Mayo, Chase *v.* 523
Megevand, Foster *v.* 499
Meikle, *In re* 515
Mellersh *v.* Keen 177
Menck, Partridge *v.* 91
Meneely *v.* Meneely 472
Mercer, Brown *v.* 435
Merchant, Fetridge *v.* 145
Merchant Banking Company of London (Limited) *v.* Merchants' Joint Stock Bank 619
Meriden Britannia Co., Boardman *v.* 302
Meriden Britannia Co. *v.* Parker 409
Merrimack Manufacturing Co. *v.* Garner 134
Messerole *v.* Tynberg 300
Metzler *v.* Wood 587
Meyer, India Rubber Comb Co. *v.* 475
Mickle *v.* Emery 495
Milbourn, Bond *v.* 383
Millar, Lea *v.* 513
Millington *v.* Fox 63
Mills, Johnson & Co., Kidd & Co. *v.* 437
Milner *v.* Reed 328
Missouri (State of) *v.* Gibbs 436
Mitchell, *In re* (1) 568
(2) 611
Condy *v.* 561
Moat, Morison *v.* 110
Moet *v.* Clybouw 533
v. Couston 235
v. Pickering 567
Montague *v.* Moore 242
Moore, Apollinaris Co. *v.* 675
Montague *v.* 242
Tallcot *v.* 478
Moorman *v.* Hoge 373
Morgan, Knott *v.* 57
v. McAdam 267
Morgan Sons Co. *v.* Troxell 674
Morison *v.* Moat 110
v. Salmon 68
Morris *v.* Moss 131
Morrison *v.* Case 394
Morse *v.* Cornwell 445
v. Worrell 445
Morson, Carnrick *v.* 543
Mortimer, Prowett *v.* 141
Moses *v.* Sargood, Ewen & Co. 636
Moss, Boon *v.* 576
Morris *v.* 131
Motley *v.* Downman 61
Munro, Bain *v.* 588
Murphy, Christy *v.* 137

Myers *v.* Baker 167
Cave *v.* 304

N.

Nairn, Linoleum Manufacturing Co. *v.* 536
Newbery *v.* James 24
Newby *v.* Oregon Central Railway Co. 318
Newling *v.* Dobell 303
Newman *v.* Alvord 282
Newton, Fleming *v.* 94
Nixey *v.* Roffey 343
Noah, Snowden *v.* 41
Norfolk, Peabody *v.* 290
Norman, Radde *v.* 397
Norris, Rivero *v.* 299
Norrish, Apollinaris Co. *v.* 465
Norton, Bradley *v.* 250
Nowill, Rodgers *v.* (1) 82
(2) 115

O.

O'Connor, Wolmershausen *v.* 552
Ogden, R. *v.* 54
Oldham *v.* James 209
Oregon Central Railway Co., Newby *v.* 318
Orr *v.* Diaper 519
Orr Ewing & Co., *In re* 586
Orr Ewing & Co. *v.* Chooneeloll Mullick 241
Orr Ewing & Co. *v.* Johnston & Co. 646
Osborne, Hudson *v.* 323
Williams *v.* 254
Osgood *v.* Allen 410
v. Rockwood 439

P.

Paine, Stevens *v.* 297
Palmer, *In re* 378
v. Harris 308
Park, *In re* 544
Parker, *In re* 582
Meriden Britannia Co. *v.* 409
Parsons *v.* Hayward 206
Partridge *v.* Menck 91
Paton, *In re* 601
Payne, Blofeld *v.* 50
Peabody *v.* Norfolk 290
Peake, Boulnois *v.* 294
Pearce, Farr *v.* 28
Pearson, Harper *v.* 193
Peck, McCardel *v.* 233
Peel, Stephens *v.* 273
Pelsall Coal and Iron Co., Barrows *v.* 530
Peltz *v.* Eichele 485
Perry *v.* Truefitt 73
Peru (Republic of) *v.* Reeves 482
Peters, Swift *v.* 554
Peterson *v.* Humphrey 149
Weed *v.* 387
Peto, Ponsardin *v.* *Ex parte* Uzielli 229
Petter, Crookes *v.* 181
Mack *v.* 403
Phalon, Burnett *v.* 277
v. Wright 232
Phelan *v.* Collender 479
Philp, Rodgers *v.* 352
Pickering, Moet *v.* 567
Pidding *v.* How 60
Pierce *v.* Franks 81
Pillow, Barnard *v.* 293
Pinto Leite, Carver *v.* 356
Plate, Derringer *v.* 249
Graham *v.* 347
Ponsardin *v.* Peto, *Ex parte* Uzielli 229
Popham *v.* Cole 425
v. Wilcox 425
Porter Blanchard's Sons, *In re* 358
Pottage, Hookham *v.* 398
Potter *v.* Commissioners of Inland Revenue 128
Powell, *In re* 589
v. McNulty 526
Seltzer *v.* 374
Power *v.* Barham 56
Pratt, *In re* 589
Partt & Farmer, *In re* 527
Price, Henry *v.* 48
Prince Metallic Paint Co. *v.* Carbon Metallic Paint Co. 573
Pritchard, Gee *v.* 30
Procter & Gamble *v.* McBride 657
Provezende, Seixo *v.* 256
Prowett *v.* Mortimer 141
Prudential Assurance Co. *v.* Knott 453
Purser *v.* Brain 92

Q.

Quiddington, Robertson *v.* 189

R.

R. *v.* Ardley 349
v. Bryan 147
v. Carter 287
v. Closs 155
v. Dundas 120
v. Gray & Gosling 183
v. Hunter 287
v. Jones 182
v. Ogden 54
v. Smith 161
v. Suter & Coulson 285
Rabone Bros. & Co. *In re* 643
Radde *v.* Norman 397
Rader & Co. *In re* 612
Raggett *v.* Findlater 431
Ransome *v.* Bentall 53
Ratcliff, Woollam *v.* 217
Ray, Ledger *v.* 550
Read, Gibblett *v.* 3
Reed, Connell *v.* 670
Milner *v.* 328
Reeves, Collins Co. *v.* 164
v. Denicke 368
Peru (Republic of) *v.* 482
Reid *v.* Sibbald 438
Reynolds *v.* Bullock 615
Smith *v.* (1) 401
(2) 402
(3) 511
Southorn *v.* 243
Richards *v.* Williamson 441
Richardson, *In re* 416
Macdonald *v.* 165
Rillet *v.* Carlier 334
Rivero *v.* Norris 299
Roach, *In re* 516
Roberts, *In re* (1) 359
(2) 360
(3) 361
(4) 362
Robertson *v.* Quiddington 189
Robineau *v.* Charbonnel 498
Robinson *v.* Finlay 585
Ward *v.* 585
Rockwood, Osgood *v.* 430
Rodgers *v.* Nowill (1) 82
(2) 115
v. Philp 352
v. Rodgers 442
Roffey, Nixey *v.* 343
Rogers *v.* Taintor 283
Rohland, *In re* 497
Rohmann, Osborne & Co., Hennessy & Co. *v.* 531
Rolt *v.* Bulmer 614
Rooke, Green *v.* 389
Rose *v.* Henley 551
v. Loftus 608
Rosing, *In re* 621
Ross, Marshall *v.* 316
Rotherham, *In re* 647
Rothschild, *In re* 456
Rouch, Burfield *v.* 208
Routh *v.* Webster 86
Rowe & Post, *In re* 491
Rowland *v.* Breidenbach 386
Scott *v.* 393
Rowley *v.* Houghton 301
Royal B'k'g Powder Co. *v.* McQuade 670
Royal B'k'g Powder Co. *v.* Royal Chemical Co. 656
Royal Chem. Co., Royal B. P. Co. *v.* 656
Rubber Clothing Co. *In re* 507
Rudderow *v.* Huntington 101
Rushton, Ayer *v.* 574
Rutherford, Llewellyn *v.* 462

S.

Salamon, *In re* 569
Sales, Pollard & Co. *Ex parte* 620
Salmon, Morison *v.* 68
Samson, Steinthal *v.* 546
Samuel *v.* Berger 143
Sands, Woods *v.* 467
Sargood, Ewen & Co., Moses *v.* 636
Saunders, Correspondent Newspaper Co. *v.* 246
Saunion & Co. *In re* 625
Sawyer *v.* Horn 667
Saxby *v.* Easterbrook 606
Saxony, *Ex parte* King of 598
Schiele *v.* Brakell 219
Schultz & Co., Lautz Bros. & Co. *v.* 496
Schweitzer *v.* Atkins 298
Scott *v.* Mackintosh 20
v. Rowland 393
v. Scott 268
Scoville *v.* Toland 97
Seabury *v.* Grosvenor 562
Searing, Howe *v.* 185

Sedon *v.* Senate 18
Seeley *v.* Fisher 67
Seixo *v.* Provezende 256
Selby *v.* Anchor Tube Co. 566
Sellers, Fulton *v.* 279
Seltzer *v.* Powell 374
Senate, Sedon *v.* 18
Shackle *v.* Baker 13
Shakespear, Wheeler & Wilson Manufacturing Co. *v.* 322
Shaw, Delondre *v.* 44
Farina *v.* 113
Sheard, Chappell *v.* 132
Shepherd, Green *v.* 262
Sheppard, Chance *v.* 317
Sherwood *v.* Andrews 263
Shipwright *v.* Clements 350
Shrimpton *v.* Laight 123
Sibbald, Reid *v.* 438
Siegert *v.* Ehlers 432
v. Findlater 591
Silverlock, Farina *v.* 130
Simpson & Sons, *In re* 508
Singer Manuf. Co. *v.* Brill 672
v. Larsen 659
v. Loog 635
v. Wilson 477
Singer Manuf. Co. *v.* Kimball & Morton 413
Singleton *v.* Bolton 4
Slade, Jendwine *v.* 8
Smale *v.* Graves 102
Smith *v.* Everett 176
Glenny *v.* 247
Hargreaves *v.* 338
v. Mason 458
R. *v.* 161
v. Reynolds (1) 401
(2) 402
(3) 511
Wedgwood *v.* 96
v. Woodruff 276
Smithson, Dale *v.* 195
Stewart *v.* 142
Snowden *v.* Noah 41
Société Anonyme des Mines et Fonderies de Zinc de la Vieille Montagne *v.* Baxter 559
Sohier *v.* Johnson 408
Sohl *v.* Geisendorf 367
Southern *v.* How 1
v. Reynolds 243
Souvazoglu, Harter *v.* 454
Spear, Amoskeag Manufacturing Co. *v.* 100
Fowle *v.* 90
Spence, Williams *v.* 225
Spicer *v.* James 46
Spottiswoode *v.* Clarke 85
Spratt's Patent *v.* Ward & Co. 644
Standish *v.* Whitwell 258
Starkweather, Cook *v.* 395
Steffens, U. S. *v.* 658
Steinthal *v.* Samson 546
Stephens, *Ex parte* (1) 505
(2) 510
v. De Conto 295
Eno *v.* 609
v. Peel 273
Sternberger *v.* Thalheimer 417
Stetson, Town *v.* 306
v. Winsor 396
Steuart *v.* Gladstone 605
Stevens *v.* Paine 297
Stewart *v.* Smithson 142
Stiff, Ingram *v.* 175
Stokes *v.* Landgraff 121
Stone *v.* Carlan 104
Stonebraker *v.* Stonebraker 333
Strahan & Co. *v.* King & Co. 539
Strange, Albert (Prince) *v.* 98
Such, Clemens *v.* 429
Sullivan, Byass *v.* 188
Suter & Coulson, R. *v.* 285
Sweet, Archbold *v.* 49
Swift *v.* Dey 245
v. Peters 554
Swiss Condensed Milk Co., Anglo-Swiss Condensed Milk Co. *v.* 370
Sykes *v.* Sykes 40

T.

Taintor, Rogers *v.* 283
Tallcot *v.* Moore 478
Taylor *v.* Bemis 231
v. Bothin 664
v. Carpenter (1) 78
(2) 83
(3) 84
v. Gillies 448
Harrison *v.* 244
v. Taylor 124
Thalheimer, Sternberger *v.* 417
Thomas, *Ex parte* 69
In re 634
Colton *v.* 305
Cons. Fr. Jar Co. *v.* 665
Thompson, Crawshay *v.* 72
Isaacson *v.* 381

Thomson *v.* Winchester 59
Thorley's Cattle Food Co., Massam *v.* 560, 564, 668
Thornbury *v.* Bevill 71
Thurber, Wharton *v.* 663
Till, Coslake *v.* 42
Toland, Scoville *v.* 97
Tolle, *In re* 405
Tonge *v.* Ward 321
Town *v.* Stetson 306
Tripp, Longman *v.* 12
Troxell, Morgan Sons Co. *v.* 674
Truefitt, Perry *v.* 73
Trust, Gouraud *v.* 460
Tucker Manufacturing Co. *v.* Boyington 474
Tucker *v.* Turpin 196
Tudor *v.* Tudor 419
Turner, Beard *v.* 251
v. Evans 114
v. Major 202
Turpin, Dent *v.* 196
Tucker *v.* 196
Twentsche Stoom Bleekery Goor *v.* Ellinger & Co. 583
Tynberg, Messerole *v.* 300

U.

Uhler, Glendon Iron Co. *v.* 439
Ullmer, Guinness *v.* 89
United States *v.* Steffens 658
Upmann *v.* Elkan 369

V.

Van Nostrand, Dougherty *v.* 64
Vick, Edelsten *v.* 119
Vickery *v.* Welch 62
Vidvard & Sheehan, *In re* 469
Volta Belt Co. *In re* 468
Vowinkle, Hostetter *v.* 366

W.

Wade *v.* Jenkins 192
Wagner, Lumley *v.* 112
Walkden Aërated Waters Co. *In re* 558
Walker, Allsopp *v.* 545
Cheavin *v.* 528
Collins Co. *v.* 171
Walker, Levy *v.* 639
Walker & Co. *Ex parte* 624
Walmsley, Ainsworth *v.* 257
Walton *v.* Crowley 138
Wamsutta Mills *v.* Allen 660
Warburg & Co. *In re* 571
Ward *v.* Beeton 450
v. Drat 607
v. Robinson 585
Tonge *v.* 321
Ward & Co., Spratt's Patent *v.* 644
Watson, Cooper *v.* 5
Marshall *v.* 162
Wattles, Binninger *v.* 240
Weaver, *In re* 501
Franks *v.* 87
Webster, Routh *v.* 86
v. Webster 7
Wedderburn *v.* Wedderburn 139
Wedgwood *v.* Smith 96
Weed *v.* Peterson 387
Welch *v.* Knott 157
Vickery *v.* 62
Weldon *v.* Dicks 638
Wells, Fetridge *v.* 144
Westhead, Cartier *v.* 199
Weston *v.* Hemmons 517
v. Ketcham (1) 455
(2) 487
Wharton *v.* Thurber 663
Wheeler, Hennessy *v.* 483
Wheeler and Wilson Manufacturing Co. *v.* Shakespear 322
Whitaker, Darbey *v.* 153
White, Comstock *v.* 180
Hennessy *v.* 650
Lazenby *v.* (1) 344
(2) 346
Whitehead, Bryson *v.* 36
Whiteley, *In re* 641
Whittaker *v.* Howe 66
Whitwell, Standish *v.* 258
Whyte, *In re* 380
Wilcox, Popham *v.* 425
Wilder, Laird *v.* 418
v. Wilder 372
Wilkes, Dayton *v.* 178
Willett *v.* Blanford 70
Williams *v.* Adams 662
v. Johnson 150
v. Osborne 254
v. Spence 225
v. Williams (1) 26
(2) 29
Williamson, Richards *v.* 441
Wilson *v.* Maxfield 459

Wilson, Singer Manufacturing Co. *v.* 477
Winchester, Graveley *v.* 272
Longman *v.* 15
Thomson *v.* 59
Winsor *v.* Clyde 396
Stetson *v.* 396
Winyard, Yovatt *v.* 31
Witt *v.* Corcoran 423
Witthaus *v.* Braun 492
Wolfe *v.* Barnett 390
v. Burke 434
v. Goulard 179
v. Hart 653
Wolff, Lea *v.* 407
Wolmershausen *v.* O'Connor 552
Wood, Manhattan Medicine Co. *v.* 628
Metzler *v.* 587
Woodruff, Smith *v.* 276
Woods *v.* Sands 467
Woodside, Alleghany Fertilizer Co *v.* 364
Woodward *v.* Lazar 212
Woollam *v.* Ratcliff 217
Worral *v.* Hand 6
Worrell, Morse *v.* 445
Worthington & Co. *In re* 655
Wotherspoon *v.* Currie 329
Wotherspoon & Co. *v.* Gray & Co. 227
Wright, Blackwell *v.* 466
Heath *v.* 133
Martin *v.* 52
Phalon *v.* 232
Wylam *v.* Clarke 488

Y.

Young, *Ex parte*, *In re* Lemon Hart & Son 537
v. Macrae 205
Yovatt *v.* Winyard 31

Z.

Zeilen & Co., Ellis *v.* 348

TABLE OF ABBREVIATIONS.

A. J.	Australian Jurist.
Abb. Pr.	Abbott's Practice Reports (New York).
Act. Comm.	Acting Commissioner.
Ad. & E.	Adolphus and Ellis.
Alb. L. J.	Albany (New York) Law Journal.
Allen	Allen (Massachusetts).
Am. L. Reg.	American Law Register.
Am. L. Rev.	American Law Review.
Am. L. T.	American Law Times.
Amer. Rep.	American Reports.
App. Cas.	Appeal Cases.
Asst. Comm.	Assistant Commissioner.
Atk.	Atkins.
B. & Ad.	Barnewall and Adolphus.
B. & Cr.	Barnewall and Cresswell.
Barb. Ch.	Barbour's Chancery Reports (New York).
Barb. S. C. or Barb.	Barbour's Supreme Court Reports (New York).
Beav.	Beavan.
Beng. L. R. App.	Bengal Law Reports, Appendix.
Biss.	Bissell (U. S. Circuit Court).
Bl. C. C.	Blatchford (U. S. Circuit Court).
Bos.	Bosworth (New York).
Bos. & P. N. S.	Bosanquet and Puller New Reports.
Brews.	Brewster (Pennsylvania).
Browne	Browne (Massachusetts).
Bush	Bush (Kentucky).
C. B.	Common Bench.
C. C. C.	Central Criminal Court.
C. C. C. Sess. Pap.	Central Criminal Court Sessions Papers.
C. C. R.	Court of Crown Cases Reserved.
C. & P.	Carrington and Payne.
C. P.	Common Pleas.

C. P. Div.	Common Pleas Division.
Cal.	California.
Ch. D.	Chancery Division.
Chicago L. N.	Chicago Legal News.
Chitty Gen. Pr.	Chitty's General Practice.
Cinc.	Cincinnati.
Codd. Dig.	Coddington's American Digest of Trade-Mark Cases.
Comm.	Commissioner.
Comm. of App.	Commission of Appeals (New York).
Conn.	Connecticut.
Coop.	Cooper.
C. P. Coop.	C. P. Cooper.
Cor.	Coryton (Bengal).
Cox	Cox's Criminal Cases.
R. Cox	R. Cox's American Trade-Mark Cases.
Cro.	Croke.
Ct. of App.	Court of Appeal.
Ct. of Sess. Cas.	Court of Sessions Cases (Scotch).
Cush.	Cushing (Massachusetts).
D. & B.	Dearsley and Bell.
D. & R.	Dowling and Rylands.
Daly	Daly (New York).
Deady	Deady (U. S. Circuit Court).
De G., F. & J.	De Gex, Fisher and Jones.
De G. & J.	De Gex and Jones.
De G., J. & S.	De Gex, Jones and Smith.
De G., M. & G.	De Gex, Macnaghten and Gordon.
De G. & Sm.	De Gex and Smale.
Dill.	Dillon (U. S. Circuit Court).
Doug.	Douglas.
Drew.	Drewry.
Drew. & Sm.	Drewry and Smale.
Duer	Duer (New York).
E. & B.	Ellis and Blackburn.
Ell. & Ell.	Ellis and Ellis.
Eq. Rep.	Equity Reports.
Esp. N. P. C.	Espinasse, Nisi Prius Cases.
Ex.	Exchequer.
Ga.	Georgia.
Giff.	Giffard.
H. L. C.	House of Lords Cases.
H. of L.	House of Lords.

H. & M.	Hemming and Miller.
H. & N.	Hurlstone and Norman.
H. & Tw.	Hall and Twells.
H. & W.	Harrison and Wollaston.
Hand	Hand (New York).
Hilt.	Hilton (New York).
Hoff.	Hoffman (New York).
Holmes	Holmes (U. S. Circuit Court).
Hopk.	Hopkins (New York).
How. App. Cas.	Howard's Appeal Cases (New York).
How. Pr.	Howard's Practice Cases (New York).
Hughes	Hughes (U. S. Circuit Court).
Hun	Hun (New York).
Ill.	Illinois.
Ind.	Indiana.
Ir. Ch.	Irish Chancery.
Ir. Eq.	Irish Equity.
Ir. Jur.	Irish Jurist.
J. & H.	Johnson and Hemming.
J. & S.	Jones and Spencer (New York).
Jac.	Jacob.
Jac. & W.	Jacob and Walker.
Johns.	Johnson.
Journ. of Jurisp.	Journal of Jurisprudence (Scotch).
Jur.	Jurist.
K. & J.	Kay and Johnson.
Keyes	Keyes (New York).
Ky.	Kentucky.
L. J. Bkptcy.	Law Journal, Bankruptcy.
L. J. Ch.	Law Journal, Chancery.
L. J. C. P.	Law Journal, Common Pleas.
L. J. Ex.	Law Journal, Exchequer.
L. J. K. B.	Law Journal, King's Bench.
L. J. M. C.	Law Journal, Magistrates' Cases.
L. J. Notes of Cases.	Law Journal, Notes of Cases.
L. J. P. C.	Law Journal, Privy Council.
L. J. Q. B.	Law Journal, Queen's Bench.
L. R. Ch.	Law Reports, Chancery Appeals.
L. R. C. P.	Law Reports, Common Pleas.
L. R. Eq.	Law Reports, Equity.
L. R. H. L.	Law Reports, House of Lords (English and Irish).
L. R. P. C.	Law Reports, Privy Council.

L. T.	Law Times.
La. Ann.	Louisiana Annual Reports.
Lans.	Lansing (New York).
Lathrop	Lathrop (Massachusetts).
Leg. Obs.	Legal Observer.
M. M. A.	Merchandise Marks Act, 1862.
M. & Rob.	Moody and Robinson.
Mac. & G.	Macnaghten and Gordon.
Madd.	Maddock.
Man. & G.	Manning and Granger.
Mass.	Massachusetts.
McLean	McL an (U. S. Circuit Court).
Md.	Maryland.
Me.	Maine.
Mer.	Merivale.
Mich. C. C.	Michigan Circuit Court.
Mich. N. P.	Michigan Nisi Prius.
Mo.	Missouri.
Mod.	Modern Reports.
Mont., D. & De G.	Montague, Deacon and De Gex.
Monthly L. R.	Monthly Law Reports.
Moo. P. C.	Moore's Privy Council Cases.
My. & Cr.	Mylne and Craig.
N. Car.	North Carolina.
N. P.	Nisi Prius.
N. R.	New Reports.
N. S.	New Series.
N. Y.	New York.
N. & M.	Neville and Manning.
N. & P.	Neville and Perry.
Neb.	Nebraska.
Paige	Paige (New York).
Pemb.	Pemberton on Judgments.
Penn. L. J.	Pennsylvania Law Journal.
Penn. St.	Pennsylvania State Reports.
Ph.	Phillips.
Phila.	Philadelphia.
Pick.	Pickering (Massachusetts)
Post	Post (Missouri).
R. I.	Rhode Island.
Rep.	Reporter (Boston).
Robertson	Robertson (New York).
Russ.	Russell.

S. & S.	Simons and Stuart.
Sandf. Ch.	Sandford's Chancery Reports (New York).
Sandf. S. C.	Sandford's Supreme Court Reports (New York).
Sawyer	Sawyer (U. S. Circuit Court).
Scot. L. Rep.	Scottish Law Reporter.
Scott N. R.	Scott's New Reports.
Seton	Seton on Decrees.
Sickles	Sickles (New York).
Sim.	Simons.
E. D. Smith	E. D. Smith (New York).
Story	Story (U. S. Circuit Court).
Sup. Ct.	Supreme Court.
Super. Ct.	Superior Ct.
Swanst.	Swanston.
T. M. A.	Trade-Marks Registration Act.
Thomp. & C.	Thompson and Cook (New York).
Trade-Marks	British and Foreign Journal of Commerce, Trade-Marks, and International Exhibitions.
Trans. App.	Transcript Appeals (New York).
U. S.	Otto, U. S. S. C. Reports.
U. S. C. C., Dt. of —	United States Circuit Court, District of —.
U. S. Pat. Comm. Decis.	Decisions of the U. S. Commissioner of Patents.
U. S. Pat. Gaz.	United States Official Patent Gazette.
U. S. Rep.	United States Supreme Court Reports.
U. S. Sup. Ct.	United States Supreme Court.
V. & B.	Vesey and Beames.
V. R. Eq.	Victoria Reports (First Series) Equity.
Va.	Virginia.
Ves.	Vesey.
Vict. L. R. Eq.	Victoria Law Reports (New Series) Equity.
W. N.	Weekly Notes.
P. W. N.	Phila. Weekly Notes of Cases.
W. R.	Weekly Reporter.
W. Va.	West Virginia.
W. & W. (I., E. & M.)	Wyatt and Webb's Victoria Reports (Insolvency, Ecclesiastical and Matrimonial).
W., W. & A'B. Eq.	Wyatt, Webb and A'Beckett's Victoria Reports (Equity).
W., A'B. & W. Eq.	Webb, A'Beckett and Williams Victoria Reports (Equity).
Wallace	Wallace (United States Supreme Court).

Wall. Jr.	Wallace, Junior (U. S. Circuit Court).
West. L. J.	Western Law Journal.
Wils.	Wilson.
Wilson (Ind.)	Wilson's Indianapolis Reports.
Wis.	Wisconsin.
Wood. & M.	Woodbury and Minot (U. S. Circuit Court).
Y. & C. Ch.	Younge and Collyer's Chancery Reports.

TRADE-MARK CASES.

1. Southern *v.* How.

Temp. Jac. 1. *Common Pleas.* — *Popham*, 144; *Cro. Jac.* 471; 2 *Rolle*, 28; *R. Cox*, 633.

ACTION on the case for deceit.

Doderidge, J., cited a case in which it was held by the Court of Common Pleas, in the reign of Queen Elizabeth, that an action on the case for deceit would lie against a clothier who had applied another's mark to his own inferior cloth. Popham says the action was brought by the defrauded clothier; Croke, by the purchaser; but Rolle states that this was not mentioned, but conjectures that it was by the purchaser.

2. Blanchard *v.* Hill.

December 18, 1742. *Lord Hardwicke, C.* — 2 *Atk.* 484; *R. Cox*, 633.

MOTION for injunction, to restrain the use of the Great Mogul stamp on cards, refused.

"Every particular trader has some particular mark or stamp; but I do not know of any instance of granting an injunction here to restrain one trader from using the same mark with another, and I think it would be of mischievous consequence to do it. Mr. Attorney General has mentioned a case where an action at law was brought by a clothworker against another of the same trade for using the same mark, and a judgment was given that the action would lie. But it was not the single act of making use of the mark that was sufficient to maintain the action, but doing it with a fraudulent design, to put off bad clothes by this means, or to draw away customers from the other clothier; and there is no difference between a

tradesman's putting up the same sign, and making use of the same mark, with another of the same trade." "An objection has been made that the defendant, in using this mark, prejudices the plaintiff by taking away his customers. But there is no more weight in this than there would be in an objection to one innkeeper setting up the same sign with another."[1]

3. Gibblett *v.* Read.

17 Geo. 2. *Lord Hardwicke, C.* — 9 *Mod.* 459.

SUIT by the children of the proprietor of nineteen out of twenty shares in the St. James' Evening Post newspaper.

Held, that such shares belonged to the personal estate of the deceased proprietor, and must be accounted for by his widow and executrix accordingly.

"The case was put of physical secrets or nostrums, where everything was carried on by the materials purchased after the testator's death, and yet the nostrum is part of the personal estate of the testator. This has been resembled to the case of a shoemaker; and, in that case, suppose the dealing has been extensive, and carried on in partnership, and with the father's stock, the son, who is executor, would be accountable. Suppose the house were a house of great trade, he must account for the value of what is called the good-will of it." "In the case of Tipping, if anybody had thought of his nostrum, as he had no patent, any discoverer might have sold it."

4. Singleton *v.* Bolton.

1783. *King's Bench.* — 3 *Doug.* 293; *R. Cox*, 634.

THE plaintiff manufacturing and selling, in succession to his father, a medical preparation under the name of "*Dr. Johnson's Yellow Ointment*," and the defendant having begun to sell a medicine under the same name, plaintiff nonsuited in an action, and a rule which had been obtained for a new trial discharged.

[1] In *Amoskeag Man. Co.* v. *Spear*, 100, commenting upon this case Judge Duer said: "Lord Hardwicke refused an injunction in a case in which, at the present day, one would certainly be granted."

Per Lord Mansfield, C. J. "If the defendant had sold a medicine of his own under the plaintiff's name or mark, that would be a fraud for which an action would lie. But here both the plaintiff and defendant use the name of the original inventor, and no evidence was given of the defendant having sold it as if prepared by the plaintiff. The only other ground on which the action could be maintained was that of property in the plaintiff, which was not pretended, there being no patent, nor any letters of administration."

5. Cooper *v.* Watson.

1784. *King's Bench.* — 3 *Doug.* 413.

ACTION of covenant on articles of partnership in a brewing business, by which it was covenanted that the partnership should continue for eleven years, with a proviso that either partner should be at liberty to quit the trade and mystery of a brewer, on giving six months' notice to the other, and that the party to whom such notice should be given might be at liberty to continue the trade on his own account.

The defendant continuing to trade as a brewer on his own account, after giving the six months' notice:

Held, that on the construction of the covenant the defendant must quit the business altogether.

6. Worral *v.* Hand.

1791. *Lord Kenyon, C. J., at N. P.* — *Peake*, 105.

ACTION of assumpsit for goods sold and delivered, the defendant being the administratrix of a publican, and having sold the good-will of the public-house for a sum of money:

Held, that the sum which she had received was assets in her hands, though she was tenant at will after the death of the intestate.

7. Webster *v.* Webster.

May 19, 1791. *Lord Thurlow, C.* — 3 *Swanst.* 490.

MOTION by one of three executors of a deceased person for an injunction to restrain the other two executors, whose partner the deceased had been, from continuing to use the name of their deceased partner in their business, refused, on the ground that no liability could thereby be thrown upon the deceased partner's estate, and that the possible fraud upon the public gave the executor no claim against the defendants.

8. Jendwine *v.* Slade.

July 12, 1797. *Lord Kenyon, C. J., at N. P.* — 2 *Esp. N. P. C.* 572.

ACTION to recover damages on the sale of two pictures, copied respectively from Claude Lorraine and Teniers, but sold under a catalogue which described them as by those artists.

Held, that the description did not amount to a warranty.

"It was impossible to make this the case of a warranty. The pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of the artist whose name it bore, or not. The catalogue only expressed the opinion of the vendor, but left the determination to the buyer's own judgment." [1]

9. Hammond *v.* Douglas.

July 31, 1800. *Lord Loughborough, C.* — 5 *Ves.* 539.

ON exceptions to the master's report, which stated the purchase money of the good-will of a partnership business to belong to the joint estate of the partners, one of whom was dead:

Held, that the sum belonged to the survivor.

[1] See *Power* v. *Burham*, **56**; *Lord Byron* v. *Johnston*, **23**.

The Lord Chancellor was "clearly of opinion that upon a partnership without articles the good-will survives; and a sale of it cannot be compelled by the representative of the deceased partner, being the right of the survivor, which the law gives him, to carry on the trade: it is not partnership stock of which the executor may compel a division."

10. Hogg *v.* Kirby.

March 15, 1803. *Lord Eldon, C.* — 8 *Ves.* 215.

THE plaintiff being the proprietor of a magazine called "*The Wonderful Magazine*," the defendant began to bring out an extremely similar publication, which he described as a "*New Series, Improved.*"

Injunction granted to restrain the wrongful acts of the defendant; and *Held*, that the fact that the plaintiff's work was incorrectly stated to be "by William Granger, Esq.," did not disentitle the plaintiff to his injunction, but should be left to form an ingredient in the action for damages.

It is competent to any person, perceiving the success of a literary work, "to set about a similar work, *bonâ fide* his own. But it must be in substance a new and original work, and must be handed out to the world as such." "I shall state the question to be, not whether this work is the same, but, in a question between these parties, whether the defendant has not represented it to be the same; and whether the injury to the plaintiff is not as great, and the loss accruing ought not to be regarded in equity upon the same principles between them as if it was, in fact, the same work."[1]

[1] In *Edmonds* v. *Benton*, **33**, the name "*The Old Real John Bull*" was held to be an infringement of "*The Real John Bull.*" "*The Edinburgh Philosophical Journal, conducted by Dr. Brewster and Prof. Jameson,*" was held to be infringed by "*No.* 1 *of a New Series of the Edinburgh Philosophical Journal, conducted by Dr. Brewster.*" In *Chappell* v. *Davidson*, **136**, the name "*Minnie*" was used by plaintiffs; an injunction was granted to restrain defendants from using "*Minnie Dale,*" and "*Minnie, Dear Minnie.*" In *Prowett* v. *Mortimer*, **141**, "*The Britannia*" newspaper was combined with "*John Bull,*" under the name of "*The John Bull and Britannia;*" the former publisher of "*The Britannia*" was restrained from printing "*The True Britannia*" as a continuation of "*The Britannia.*" In *Clement* v. *Maddick*, **174**, plaintiff's newspaper was called "*Bell's Life in London;*" an injunction was granted to restrain the use of the name "*The Penny Bell's Life and Sporting News.*" In *Ingram*

11. Bunn *v.* Guy.

November 7, 1803. *King's Bench.* — 4 *East*, 190.

CASE sent from Chancery. *Held*, that a contract entered into by a practising attorney to relinquish his business and recommend his clients to two other attorneys for a valuable consideration, and that he would not himself practise in such business within certain limits, and would permit them to use his name in their firm for a certain time, but without his interference, etc., was good in law.

v. *Stiff*, **175**, the name "*The London Journal*" was held to be invaded by "*The New London Journal.*" "*The United States Police Gazette*" was treated as a fraudulent imitation of "*The National Police Gazette*," the two papers being of the same general appearance, in *Matsell* v. *Flanagan*, **270**. "*The Bedfordshire Express and General Advertiser for the County*," and "*The Bedfordshire Express and General Advertiser for the Counties of Cambridge, Hertfordshire, Huntingdonshire, and Middlesex*," were held to conflict, the words "*The Bedfordshire Express*" being in similar type. In *Clowes* v. *Hogg*, **345**, "*London Society*" and "*English Society*" were held to conflict, the two publications being much the same in appearance. In *Mack* v. *Petter*, **403**, plaintiff's book was called "*The Birthday Scripture Text Book;*" it was held to be infringed by "*The Children's Birthday Text Book.*" "*The Iron Trade Circular (Rylands')*," and "*The Iron Trade Circular (Edited by Samuel Griffiths)*," were held to conflict in *Corns* v. *Griffiths*, **420**. In *Metzler* v. *Wood*, **587**, the plaintiff's book was called "*Henry's Royal Modern Tutor for the Pianoforte*," and was protected as against "*Henry's New and Revised Edition of Jousse's Royal Standard Pianoforte.*" In *Snowden* v. *Noah*, **41**, plaintiff's paper was called "*The National Advocate*," and defendant's "*The New York National Advocate;*" the papers not being of the same size and appearance, an injunction was refused. In *Bell* v. *Locke*, **65**, the names were "*The Democratic Republican New Era*," and "*The New Era;*" in *Stephens* v. *De Conto*, **295**, "*La Cronica*" and "*El Cronista;*" in both cases the papers did not look alike, and the prayer for relief was denied. In *Bradbury* v. *Beeton*, **320**, "*Punch*," and "*Punch and Judy;*" in *Tallcot* v. *Moore*, **478**, "*The Little Red Book, New Series*, 1876," and "*The Red and White Book;*" in *The American Grocer Publishing Association* v. *Grocer Publishing Company*, **503**, "*The American Grocer*," and "*The Grocer*," in all of which instances the court refused to interfere.

It is scarcely possible to reconcile the decisions upon this branch of the law of trade-marks, except by recognizing that the American cases, and probably the English, proceed upon the assumption that, as a general rule, the appearance of the papers is a controlling consideration.

See *Jollie* v. *Jaques*, **105**.

12. Longman *v.* Tripp.

November 21, 1805. *Common Pleas.* — 2 *Bos. & P. N. R.* 67.

ACTION of assumpsit. *Held*, that the right of printing and publishing the Bristol Mercury newspaper passed, on the bankruptcy of the printer and publisher, to his assignees in bankruptcy, as being goods and chattels within 21 Jac. I. c. 19, s. 11, notwithstanding an assignment thereof as a security previously made to a creditor, but not made public.

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13. Shackle *v.* Baker.

February 6, 1808. *Lord Eldon, C.* — 14 *Ves.* 468.

MOTION for an injunction to restrain the defendants from proceeding at law under a judgment, the plaintiff alleging that the defendants, the good-will of whose business he had bought, were carrying on business in competition with him, after they had persuaded him to omit a covenant against so doing in the agreement for sale, on the ground that it was unnecessary for him to have more than their word, refused.

"I cannot see my way to grant an injunction in this case. If it had been nothing more than a purchase of the good-will of this trade, the vendor would be at liberty to set up the same trade in any other situation. Against that the purchaser has the choice of several securities. He may rest upon the assurance of the vendor; he may require a covenant; but resting upon a covenant, he can have nothing more than an action for damages, and the observation that such an action is an extremely imperfect remedy has been repeatedly made. The parties may, therefore, proceed to ascertain for themselves what shall be the damages from time to time, and, unless they are so awkward as to put that in the shape of penalty instead of liquidated damages, there is a perfect and absolute remedy."

14. Crawshay *v.* Collins.

July 26, 1808. *Lord Eldon, C.* — 15 *Ves.* 218.

PARTNERSHIP suit.

P. 27. The Lord Chancellor agreed with the doubt expressed by Sir Samuel Romilly upon the decision in *Hammond* v. *Douglas*, 5 Ves. 539, that the good-will of a partnership business survived to the surviving partner.

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15. Longman *v.* Winchester.

November 23, 1809. *Lord Eldon, C.* — 16 *Ves.* 269.

MOTION to dissolve an injunction which had been granted to restrain the pirating of a court calendar refused.

"In the case of *Hogg* v. *Kirby* there was no doubt that any person might publish a work of that description which was the subject of that injunction. Each party might publish his own collection, and the articles might happen to be the same, but the one could not excite the public curiosity by copying into his work from that of the other. The defendant in that case had not done that; but he published a number of a work as a continuation of the plaintiff's old work, taking the credit which had been acquired by that to his own, and that he was not permitted to do."

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16. Featherstonhaugh *v.* Fenwick.

April 18, 1810. *Grant, M. R.* — 17 *Ves.* 298.

PARTNERSHIP suit. *Held*, that the consequence of the dissolution of a partnership, where there were no articles prescribing the terms, was a general sale and account of the joint property; and that some of the partners could not, therefore, insist on taking the share of another partner at a valuation, nor that he should remove his property from the premises, so as to deprive him of his share in the good-will, nor retain the benefit of a clandestine renewal to them of the lease of the partnership premises, since that would be to give them the whole benefit of the good-will, but that such renewed lease must be included in the valuation of the partnership property.

17. Cruttwell *v.* Lye.

November 21, 1810. *Lord Eldon, C.* — 17 *Ves.* 335; 1 *Rose*, 123.

THE plaintiff having bought from the defendant's assignees in bankruptcy the good-will of his principal carrying business, and a subordinate business of the same kind having been bought back for the defendant at the same time, the latter recommenced business in such a manner as to render a mistake between the two businesses possible.

Motion for an injunction to restrain the defendant from so doing refused, on the ground that the defendant was entitled to carry on a similar business, if he did not hold it out as being the same.

"There can be no doubt that this court would interpose against that sort of fraud which has been attempted by setting up the same trade in the same place, under the same sign or name, the party giving himself out as the same person."

"I cannot say that any of those interests which a bankrupt is supposed to have by the effect of the certificate, or in the surplus of his estate after payment of his debts, form a principal upon which he should not be permitted to engage again in the like trade, which in this sort of case is materially distinguished from the same trade. In *Hogg* v. *Kirby*, the defendant's magazine, being published as a continuation of the plaintiff's, was the same."

"The good-will, which has been the subject of sale, is nothing more than the probability that the old customers will resort to the old place."

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18. Sedon *v.* Senate.

1811. *Grant, M. R.* — *Cited* 2 *V. & B.* 220.

THE defendant, having sold a medicine to the plaintiff, began to sell another under a similar description, and to put forth advertisements containing verses which had before been used on the original medicine.

Injunction granted to restrain the defendant from continuing so to do, though the plaintiff had no patent for the medicine.

19. Canham *v.* Jones.

June 23, 1813. *Plumer, V. C. of E.* — 2 *V. & B.* 218.

THE plaintiff being the proprietor of a secret medicine called "*Velno's Vegetable Syrup*," the defendant, who had been in the plaintiff's service, and had there become acquainted with a part of the secret, began to make and sell a spurious preparation under the same name.

Demurrer to a bill for an injunction to restrain him from so doing allowed, on the ground that there was no exclusive right in a medicine, not protected by patent, such as to prevent the sale of a medicine under the same title by another person, the latter not assuming the name and character of the original maker.[1]

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20. Scott *v.* Mackintosh.

May 8, 1813. *Lord Eldon, C.* — 1 *V. & B.* 503.

MOTION to revive an injunction to restrain the defendant from proceeding at law refused.

"Where a man sells the good-will of a trade and covenants to make it as profitable as he can, the actual profit made is not that which the vendee is bound to take; but he will have an action of covenant, if he can establish his title to more through the default of the vendor."

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21. Day *v.* Day.

1816. *Chancery.* — *Eden on Inj.* (*ed. of* 1821) 314.

THE defendant having placed on his blacking certain labels in imitation of those used by the plaintiff on his, injunction granted to restrain the infringement.

[1] See *Burnett* v. *Phalon*, 277.

22. Bozon *v.* Farlow.

July 29, 1816. *Grant, M. R.* — 1 *Mer.* 459.

BILL by the vendor, for the specific performance of an agreement for the sale of an attorney's practice, dismissed, on the ground that the agreement contained no express stipulations enabling the court to carry it into effect on the vendor's part, in return for the purchase money, and that there were no conditions so generally applicable to such transactions as to be capable of being inserted by way of "usual clauses." And *Held*, that it was doubtful whether such an agreement was in its nature valid, either on the ground of morality or of public policy; and further, whether, if legally valid, it was of such a nature as to be capable of being enforced in equity.

23. Lord Byron *v.* Johnston.

November 28, 1816. *Lord Eldon, C.* — 2 *Mer.* 29.

THE defendant having advertised for sale certain poems of which he represented the plaintiff to be the author, on motion on behalf of the plaintiff (he being absent abroad), and upon affidavits by his agents of circumstances leading to the belief that the poems were not his work, and the defendant refusing to swear to his belief that they were so, injunction granted to restrain the defendant, until answer or further order, from publishing such poems in the plaintiff's name, or as his work.[1]

[1] In *Archbold* v. *Sweet*, **49**, damages were recovered against defendant for issuing an inaccurate edition of a book falsely purporting to have been prepared by plaintiff.

In *Seeley v. Fisher*, **67**, it was ruled that an action would lie for an untrue statement that a book was not the work of the author "while still vigorous."

In *Prince Albert v. Strange*, **98**, defendant was restrained from exhibiting certain etchings and publishing a catalogue of them, the etchings having been surreptitiously obtained.

In *Clemens* v. *Such*, **429**, a false use of the *nom de plume* "Mark Twain" was enjoined.

On the contrary, in *Martin* v. *Wright*, **52**, the court refused to restrain a false use of the name of a painter; but upon the same facts it is probable that the same tribunal would not now decline to grant an injunction. In *Regina* v. *Closs*, **155**, it was, in effect, decided that the name of a painter applied to his picture is a trade-mark.

See *Hogg* v. *Kirby*, **10**.

24. Newbery *v.* James.

March 27, 1817. *Lord Eldon, C.* — 2 *Mer.* 446.

On motion by the defendants, injunction which had been granted to restrain them from violating an agreement not to divulge the secret of a medical preparation dissolved, on the ground that if there were a real secret in question, the court would have no means of interfering to enforce its order.

25. Harrison *v.* Gardner.

July 23, 1817. *Plumer, V. C. of E.* — 2 *Madd.* 198.

The defendant having been partner with the plaintiff, and having, on his retirement from the firm, accepted a sum awarded to him by arbitrators in respect of his share of the good-will, and calculated by them upon the understanding that he would not set up the same trade in the same street or its vicinity, injunction granted to restrain him from setting up the same trade in the same street or its vicinity.

P. 219. "What is the 'good-will' of a retail shop in a populous neighborhood? 'Good-will' is defined by Lord Eldon to be 'the probability that the old customers will resort to the old place.' *Cruttwell* v. *Lye*, 17 Ves. 346. A person, not a lawyer, would not imagine that when the good-will and trade of a retail shop were sold, the vendor might the next day set up a shop within a few doors, and draw off all the customers. The good-will of such a shop, in good faith and honest understanding, must mean all the benefit of the trade, and not merely a benefit of which the vendor might the next day deprive the vendee. The authorities, however, are strong to show that the sale of a good-will does not impart restraint, and that a person selling the good-will of a business, for however large a consideration, is not prevented from setting up the trade. In *Shackle* v. *Baker*, 14 Ves. 468, it was held that the sale of a good-will leaves the vendor at liberty to set up the same trade in *any other situation*. But here the trade is carried on in the *same* situation."

26. Williams *v.* Williams. (1.)

August 6, 1817. *Lord Eldon, C.* — 3 *Mer.* 157.

On motion by the defendant, injunction which had been granted to restrain the defendant (among other things) from divulging a secret in respect of a medicine, dissolved, on the affidavit of the defendant denying the truth of the facts as stated upon the plaintiff's affidavit, and on the ground that there was no secret. And *Held*, that it was doubtful whether a court of equity, in its jurisdiction to decree specific performance of an agreement, could interfere by injunction in such a case.

"I do not think that the court ought to struggle to protect this sort of secrets in medicine." [1]

27. Kennedy *v.* Lee.

November 17, 1817. *Lord Eldon, C.* — 3 *Mer.* 441.

Partnership suit. *Held*, that an agreement to buy up his partner's share in a nursery gardener's business did not bind the purchasing partner to pay for the outgoing partner's share in the good-will. And *Held*, that, unless there were some provisions in the agreement with respect to the good-will, and preventing the outgoing partner from carrying on business in a specified locality, the latter would be at liberty to carry on the same trade "where, and when, and with whom he pleased."

28. Farr *v.* Pearce.

February 10, 1818. *Leach, V. C. of E.* — 3 *Madd.* 74.

Suit by the personal representative of A., who had entered into articles of partnership with the defendant in his surgeon's practice, and had paid a premium.

The defendant having sold the good-will of the practice, after the death of A.: *Held*, upon the construction of the ar-

[1] See *Burnett* v. *Phalon*, 277.

ticles, that A.'s representative was not entitled to a share of the money produced by the sale of the good-will.

"In this case the articles define the interest which the representatives of a deceased partner are to take, and there is no provision which gives them the benefit of the good-will of the concern. But if the general question had arisen here, I think it would have been difficult to maintain that where a partnership is formed between professional persons as surgeons, and one dies, the other is obliged to give up his business and sell the connection for the joint benefit of himself and the estate of his deceased partner. When such partnerships determine, unless there be stipulations to the contrary, each must be at liberty to continue his own exertions; and where the determination is by the death of one, the right of the survivor cannot be affected. Such partnerships are very different from commercial partnerships."

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29. Williams *v.* Williams. (2.)

June 10, 1818. *Lord Eldon, C.* — 2 *Swanst.* 253; 1 *Wils.* 473.

THE plaintiffs having bought up the interest of the defendant, one of the partners in their coaching business, and the defendant having undertaken not to be concerned in any coach running a specified route, or prejudicial to the partnership business, but having subsequently begun to run a coach in violation of the agreement, injunction granted to restrain him from so doing.

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30. Gee *v.* Pritchard.

July 17, 1818. *Lord Eldon, C.* — 2 *Swanst.* 402.

INJUNCTION granted to restrain the publication of private letters.

P. 413. "The publication of a libel is a crime, and I have no jurisdiction to prevent the commission of crimes, except, of course, such cases as belong to the protection of infants, where a dealing with an infant may amount to a crime, — an exception arising from that peculiar jurisdiction of this court."

31. Yovatt *v.* Winyard.

May 15, 1820. *Lord Eldon, C.* — 1 *Jac. & W.* 394.

THE plaintiff, being the proprietor of the secret recipes for certain veterinary medicines, having taken the defendant into his employ under an agreement by which he was to have a salary and be instructed in the business generally, but was not to be taught the secrets, the defendant secretly acquainted himself with the secrets, and, setting up for himself, made up the medicines and sold them with directions for use copied from the plaintiff's.

On motion by the plaintiff, injunction granted to restrain the defendant from using or communicating the secret recipes, except as to the treatment of animals then in his care, and from printing and publishing the directions, on the ground that the defendant had become acquainted with the secrets by breach of trust.

32. Baxter *v.* Conolly.

July 13, 1820. *Lord Eldon, C.* — 1 *Jac. & W.* 576.

MOTION for an injunction, to restrain an action at law brought to recover an annual payment due by way of purchase money for good-will, refused.

P. 580. "The court certainly will not execute a contract for the sale of a good-will; at the same time, it will not enjoin against any proceeding at law under such an agreement. Suppose, for instance, there is a contract for the good-will of a shop; it cannot be conveyed, and the court would say, 'Go and make what you can of it at law; if you can recover, very well, we won't prevent you; if you cannot, very well again, we won't assist you.'"

33. Edmonds *v.* Benbow.

February 20, 1821. *Leach, V. C. of E.* — *Seton*, 3*d ed.* 905; 4*th ed.* 238.

THE plaintiff being the proprietor and publisher of a newspaper called The Real John Bull, injunction granted to re-

strain the publication by the defendants of a newspaper called The Real John Bull, or The Old Real John Bull, and of any other newspaper as a continuation of the plaintiff's newspaper.[1]

34. In re The Edinburgh Correspondent Newspaper.

May, 1822. *Ct. of Sess. — Ct. of Sess. Cas.* 1*st Ser. I.* (*New ed.* 407, *n.*)

THE plaintiffs being the proprietors of a newspaper entitled The Edinburgh Correspondent, interdict granted to restrain the publication of a new paper under that name.

Per Lord Balgray. "The partners under the existing firm, as publishers of the former paper, have a right to prevent any paper from being published under such title or firm as may mislead the public into a belief that it is the former paper." [2]

35. M'Cormick *v.* M'Cubbin.

July 4, 1822. *Ct. of Session. — Ct. of Sess. Cas.* 1*st Ser. I.* 541 (*New ed.* 496.)

ON the death of a person entitled to one half of the copyright and good-will of a newspaper called The Ayr Advertiser, bill of suspension and interdict presented by the persons entitled to the other half (who had themselves refused to purchase the share of the deceased proprietor) to restrain the latter's executors from offering the half share for sale refused, on the ground that the copyright and good-will of a newspaper were a species of property capable of transmission by the proprietor to his representatives, and that the latter were entitled to the benefit to be derived from a sale of the share.

36. Bryson *v.* Whitehead.

November 25, 1822. *Leach, V. C. of E.* — 1 *S. & S.* 74; 1 *L. J. Ch.* 42.

IN a suit by the vendor of the good-will of his dyeing business, with the exclusive use of a secret mode of dyeing, spe-

[1] See *Hogg* v. *Kirby*, 10. [2] *Ibid.* 10.

cific performance of the agreement between the vendor and purchaser granted.

"Although the policy of the law will not permit a general restraint of trade, yet a trader may sell a secret of business, and restrain himself generally from using that secret. Let the master, in settling the deed which is to give effect to this agreement, introduce a general covenant to restrain the use of the secret for twenty years, and a covenant limited in point of locality, as to carrying on the ordinary business of a dyer, both parties being willing that the agreement should be so modified."

37. Cook *v.* Collingridge.

January 27, 1823. *Lord Eldon, C.* — *Jac.* 607; 1 *L. J. Ch.* 74; *Collyer on Partnership* (*2d ed.*), 215.

PARTNERSHIP suit. On petition in this cause (see Collyer, *ubi sup.*) subsequent to the decision of the above date:

Held, that the partnership having expired by mere efflux-ion of time, the former copartners were under no obligation, after the sale of the business, to refrain from carrying on the same kind of business, or uniting in a new partnership with any other persons, and that notice of this must be inserted in the particulars of sale of the partnership property and effects.

38. Green *v.* Folgham.

June 10, 1823. *Leach, V. C. of E.* — 1 *S. & S.* 398; 1 *L. J. Ch.* 203.

THE secret recipe of a medical preparation, called "*Dr. Johnson's Ointment for the Eyes*," having been settled upon the parents of the parties in the suit, and after the death of the survivor of them, to be sold for the benefit of the plaintiffs and defendant, the mother, being the surviving parent, communicated the secret to the defendant for the benefit of himself and the plaintiffs, his younger brothers and sisters.

In a suit by the younger brothers and sisters, after the mother's death, *Held*, that the defendant held the secret upon the trusts of the settlement, and must account for the profits

since his mother's death (an allowance being made him for his trouble), and that an issue must be directed to ascertain the value of the secret.

"If this secret could be made a subject of sale, the plaintiffs would be next entitled to ask from the court that a sale should be directed accordingly. But inasmuch as the court has no possible means either to communicate this secret to a purchaser with certainty, or to protect him in the enjoyment of it, a sale becomes impracticable. But although the court cannot direct a sale, it has the power of taking a course which, in point of advantage, will be equivalent to the plaintiffs. It can inquire what would be the value of this secret to sell, provided it could be made the subject of sale; and the annual profits which have actually been made by the sale of the ointment from the death of the mother will be a fair criterion by which that value may be estimated."

39. Constable & Co. *v.* Brewster.

July 6, 1824. *Ct. of Session — Ct. of Sess. Cas. 1st Ser. III.* 215 *(New ed.* 152*).*

THE plaintiffs having employed the defendant for five years as one of the editors of *The Edinburgh Philosophical Journal*, which was described on the title-page as "conducted by Dr. Brewster and Professor Jameson," and the defendant having, at the end of the five years, separated from the plaintiffs and announced the publication of "*No.* 1 *of the New Series of the Edinburgh Philosophical Journal, conducted by Dr. Brewster*," interdict granted to restrain the publication of a work under that title.[1]

40. Sykes *v.* Sykes.

November 11, 1824. *King's Bench.* — 3 *B. & Cr.* 541; 5 *D. & R.* 292; 3 *L. J. K. B.* 46.

THE plaintiff having been in the habit of marking his shot-belts, powder-flasks, etc., with the words "*Sykes' Patent*" (though the patent which had been taken out had been

[1] See *Hogg* v. *Kirby*, **10**.

held to be invalid), the defendants copied this mark on their own goods.

Action on the case.

Held, by Bayley, J., at the trial, and afterwards by the Court of K. B., that the defendants had no right to mark their goods as and for the plaintiff's goods, and that the fact that the immediate purchasers knew who was the maker made no difference.

Per Abbott, C. J. "It was established most clearly that the defendants marked the goods manufactured by them with the words 'Sykes' Patent,' in order to denote that they were of the genuine manufacture of the plaintiff; and although they did not themselves sell them as goods of the plaintiff's manufacture, yet they sold them to retail dealers for the express purpose of being resold as goods of the plaintiff's manufacture. I think that is substantially the same thing."[1]

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41. Snowden *v.* Noah.

January, 1825. *N. Y. Chancery: Sandford, C. — Hopk.* 347; *R. Cox*, 1.

MOTION by a person who had purchased the right to publish a newspaper called *The National Advocate* in the city of New York, for an injunction to restrain the vendor from starting a paper in that city called *The New York National Advocate*, refused, on the ground that the names were sufficiently distinct to prevent deception.[2]

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42. Coslake *v.* Till.

August 4, 1826. *Lord Gifford, M. R.* — 1 *Russ.* 376.

SUIT by the purchaser for the specific performance of an agreement by a tenant at will of a public-house for the sale of the possession, trade, and good-will of the house at a fixed sum, and of the stock and furniture at a valuation, one of the terms

[1] See *Edelston* v. *Vick.* 119; *Leather Cloth Co.* v. *American Leather Cloth Co.* 223.

[2] See *Hogg* v. *Kirby*, 10.

being that possession should be taken and the money paid on a given day.

Held, (1.) that time was of the essence of the contract, and that the plaintiff not having been ready with the purchase money till the day after the given day, specific performance could not be granted; (2.) that it was doubtful whether a court of equity would enforce the performance of a contract for the purchase of a subject matter, of which the good-will of a public-house, unconnected with any fixed interest in the premises, formed the principal part.

43. Dakin *v.* Cope.

June 1, 1826; April, 1827. *Plumer, M. R.; Lord Gifford, M. R.; Lord Eldon, C.* — 2 *Russ.* 170.

In a suit by the executors of a publican, with whom the defendant had entered into an agreement for the purchase of the leasehold public-house and the good-will and licenses connected therewith, specific performance of the agreement granted.

44. Delondre *v.* Shaw.

April 16, 1828. *Shadwell, V. C. of E.* — 2 *Sim.* 237.

Suit commenced jointly by Delondre, the inventor, and Pelletier, the compounder, by agreement with Delondre, of "*Sulphate of Quinine*," to restrain the imitation of the labels and seals used on the bottles of quinine.

Demurrer allowed, on the ground that the parties who asked joint relief were not entitled to joint relief, Pelletier not being shown to have any interest in the labels and seals in question.

45. Chissum *v.* Dewes.

July 21, 1828. *Leach, M. R.* — 5 *Russ.* 29.

The unexpired term in a house, and the good-will of the business there carried on, having been sold in a creditor's suit, with the consent of an equitable mortgagee, and having

brought a price less in amount than the debt due to the equitable mortgagee:

Held, that the equitable mortgagee was entitled to the whole of the purchase money, whether arising from the value of the good-will, or from the value of the lease apart from the good-will.

"The good-will of the business is nothing more than an advantage attached to the possession of the house; and the mortgagee, being entitled to the possession of the house, is entitled to the whole of that advantage. I cannot separate the good-will from the lease."

46. Spicer *v.* James.

November, 1830. *Leach, M. R. — Collyer on Partnership, 2d ed.* 104.

THE administrator of an attorney having carried on the business of the intestate until the latter's son came of age, upon which he transferred the business to the latter, the latter afterwards became insolvent.

Suit by one of the creditors against the administrator for an account of the profits of the business while managed by him, and insisting that he was indebted to the intestate's estate in respect of the good-will of the business, dismissed, on the ground that the good-will of a trade of a personal nature as that of an attorney was not a subject of administration.

47. Day *v.* Binning.

January, 21, 1831. *Shadwell, V. C. of E. — C. P. Coop.* 489; 1 *Leg. Obs.* 205.

THE plaintiffs being manufacturers of blacking, which they sold in bottles labelled, among other things, with the words "*Manufactured by Day & Martin*," the defendants began to sell other blacking in similar bottles, bearing similar labels, except that for the words "*Manufactured by Day & Martin*" were substituted the words "*Equal to Day & Martin's*," "*equal to*" being in very small letters.

On motion by the plaintiffs, injunction granted to restrain

the defendants from using labels imitated from the plaintiffs'.

48. Henry *v.* Price.

March 29, 1831. *Shadwell, V. C. of E.* — 1 *Leg. Obs.* 364.

THE plaintiff preparing calcined magnesia, in succession to his father, and selling it in bottles of a special shape, labelled "*Henry's Calcined Magnesia, Manchester,*" the defendant began to prepare magnesia, and to sell it in similar bottles, similarly labelled.

On motion by the plaintiff, injunction granted to restrain the defendant from continuing to infringe the plaintiff's rights.[1]

49. Archbold *v.* Sweet.

February 9, 1832. *Lord Tenterden, C. J., at N. P.* — 1 *M. & Rob.* 162; 5 *C. & P.* 219.

THE publisher of a legal work issued an inaccurate edition of the work, falsely purporting to have been prepared by the author.

Action on the case by the author.

Held, that he was entitled to recover damages for the injury done to his reputation by the defendant's conduct, notwithstanding that the defendant was the owner of the copyright.

"The question is for the jury, whether the third edition in the form in which it is put forth would be understood by purchasers to be by the plaintiff; if purchasers who paid reasonable attention to its contents would not so understand it, the verdict must be for the defendant; if they would, for the plaintiff.

"The nearest resemblance to the present case seems to me to be furnished by those cases in which a person, having a reputation for the manufacture of a particular commodity, but not protected by a patent, brings an action against another for selling an inferior article in his name. The cases are not exactly alike: there the sale of the

[1] See *Williams* v. *Johnson*, 150.

commodity is affected, here the character of the author; but they bear a close analogy to each other." [1]

50. Blofeld *v.* Payne.

January 12, 1833. *King's Bench.* — 4 *B. & Ad.* 410; 1 *N. & M.* 353; 2 *L. J. K. B. N. S.* 68.

THE plaintiff being a manufacturer of metallic hones, which he sold in certain special envelopes containing directions for use, etc., the defendant sold other hones in similar envelopes.

Action on the case. *Held*, that although no specific damage was proved, and the jury found the defendant's articles to be equal in quality to the plaintiff's, the plaintiff was still entitled to some damages for the invasion of his right.

Lord Denman, C. J., told the jury at the trial that "even if the defendant's hones were not inferior, the plaintiff was entitled to some damages, inasmuch as his right had been invaded by the fraudulent act of the defendant."

Per Littledale, J. "The act of the defendant was a fraud against the plaintiff, and if it occasioned him no specific damage, it was still to a certain extent an injury to his right."

51. Gout *v.* Aleploglu.

April 15, 1833. *Shadwell, V. C. of E.* — 6 *Beav.* 69, *n.*; 5 *Leg. Obs.* 495 *Chitty Gen. Pr.* 721.

THE plaintiff having long manufactured watches for the Turkish and Levantine market, and marked them with his name, the Turkish word "*Pessendede*" (meaning "warranted"), a sprig, etc., the defendants began to manufacture and export watches similarly marked.

On motion by the plaintiff, *Held*, that the plaintiff had acquired, by long previous usage, the exclusive right to designate his watches by that Turkish word in Turkish characters,

[1] See *Lord Byron* v. *Johnston*, 23.

and that an injunction must be granted to restrain the defendants from infringing the plaintiff's rights.[1]

52. Martin *v.* Wright.

August 9, 1833. *Shadwell, V. C. of E.* — 6 *Sim.* 297.

THE defendant exhibited a large painting, which he represented to be a copy of a picture by the plaintiff.

Suit for an injunction and account.

Held, that equitable relief could not be granted until the plaintiff's right had been established at law.

"With respect to the defendant representing his copy as Martin's picture, it must be either better or worse: if it is better, Martin has the benefit of it; if worse, then the misrepresentation is only a sort of libel, and this court will not prevent the publication of a libel. If Martin had exhibited his picture as a diorama, then he might have been entitled to an injunction."[2]

53. Ransome *v.* Bentall.

December 11, 1833. *Shadwell, V. C. of E.* — 3 *L. J. Ch. N. S.* 161.

THE plaintiffs having been in the habit of marking their patent ploughshares with the words "*Ransome's Patent*," and the letters "*H. H.*," and also with a number denoting size, as "6," the defendant began to sell ordinary ploughshares stamped with a similar mark.

Injunction granted to restrain the defendant from continuing to infringe.

"If the defendant had been in the habit of marking his ploughs with only '*H. H.* 6,' and if I could see the marks so placed that no person could be deceived in purchasing the ploughs, then I might refuse the injunction as to that part of the prayer. But here the defendant wants me to decide *ab ante* that no possible use of '*H. H.* 6' may have the effect of misleading persons, and therefore the whole prayer must be granted."

[1] Of this case the author of a highly esteemed work on trade-marks says: "The court did *not* decide that '*Pessendede*' was a trade-mark." Browne on Trade-marks, § 223. Certainly the word would not be broadly protected as such to-day.

[2] See *Lord Byron* v. *Johnston*, 23.

54. R. *v.* Ogden.

November 29, 1834. *C. C. C.: Bolland, B. & Park, J.* — 6 *C. & P.* 631.

ON an indictment under 13 Geo. III. c. 52, s. 14, and 38 Geo. III. c. 69, s. 7, for unlawfully transposing the Hall-mark of the lion passant from one gold ring to another:

Held, that the language of the act being express, the prisoner must be convicted, notwithstanding that both rings were genuine, and that the prisoner had acted without any fraudulent intention. A pardon was subsequently granted.

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55. Lewis *v.* Langdon.

May 30, 1835. *Shadwell, V. C. of E.* — 7 *Sim.* 421; 4 *L. J. Ch. N. S.* 258.

AFTER the dissolution of the firm of "*Brookman & Langdon*" (makers of lead pencils, which they stamped with their name) by the death of one of the partners, the surviving partner, J. Lewis, took a new partner, and began to carry on business as "*James Lewis & Co., Successors to Brookman & Langdon*," and the defendant, one of the executors of the deceased partner, subsequently began to carry on business as "Brookman & Langdon."

On motion by the surviving partner in the old firm and his new partner, injunction granted to restrain the defendant from carrying on business as "*Brookman & Langdon*" until after the trial of an action at law.

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56. Power *v.* Barham.

November 26, 1835; January 14, 1836. *Coleridge, J., at N. P.* — 7 *C. & P.* 356: 1 *M. & Rob.* 507. *King's Bench.* — 4 *Ad. & E.* 473; 6 *N. & M.* 62; 1 *H. & W.* 683; 5 *L. J. K. B. N. S.* 88.

THE plaintiff bought from the defendant certain pictures which he said were by Canaletto, and which were described

in the bill of parcels as "*Four Pictures, Views in Venice — Canaletto*," but which turned out not to be by that painter.

Action of assumpsit. *Held*, that it was for the jury to say what was the effect of the words in the bill of parcels, and whether they implied a warranty of genuineness, or conveyed only a description or an expression of opinion.[1]

57. Knott *v.* Morgan.

July 27, August 19, 1836. *Lord Langdale, M. R.; Lord Cottenham, C.* — 2 *Keen*, 213.

THE omnibuses of the London Conveyance Company being painted, and their servants clothed, in a special and distinctive manner, the defendant began to run omnibuses similarly painted, with servants similarly clothed.

On motion by the plaintiffs, injunction granted to restrain the defendant from imitating the plaintiffs' line of omnibuses.

Per Lord Langdale, M. R. "It is not to be said that the plaintiffs have any exclusive right to the words '*Conveyance Company*,' or '*London Conveyance Company*,' or any other words; but they have a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on the false representation that carriages, really the defendant's, belong to and are under the management of the plaintiffs."

In *Woollam* v. *Ratcliff*, 1 H. & M. 259–261, Wood, V. C., remarking upon the above case, said that there "the words '*Conveyance Company*,' the green omnibus, etc., were held sufficient together to entitle the plaintiffs to an injunction. The defendant might have had those words painted on a yellow omnibus without objection, and so of the other resemblances; the wrong lay in their accumulation, not in any one of them alone."[2]

[1] See *Jendwine* v. *Slade*, 8.

[2] This case, perhaps, marks a pronounced advance in the law of trade-marks. It differs from earlier cases in that relief was granted although it was not made to appear that the plaintiff had an *exclusive* right. The court found in substance that the defendant had imitated the appearance of the plaintiffs' coaches, besides using the words by which its line was known. It is quite apparent that the words

58. Hitchcock *v.* Coker.

February 6, 1837. *Exch. Ch.* — 6 *Ad. & E.* 438–454; 1 *N. & P.* 796–814; 2 *H. & W.* 464–471; 6 *L. J. Ex. N. S.* 266–269.

ACTION of assumpsit.

Per Tindal, C. J. "The good-will of a trade is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader."

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59. Thomson *v.* Winchester.

March, 1837. *Mass. Sup. Ct.* — 19 *Pick.* 214; *R. Cox*, 7.

THE plaintiff selling certain medicines of his own preparation under the name of "*Thomsonian Medicines*," the defendant began to sell inferior medicines under the same name. Action on the case.

"*Conveyance Company*" were descriptive and could not be monopolized; but the defendant painted his coaches so that they would not, under ordinary circumstances, be distinguished from the plaintiffs'. There was an obvious attempt to trade upon the plaintiffs' reputation, a constructive fraud coupled with pecuniary loss, which was made the ground for the issuance of a broad injunction.

The case is not the same as *Stone* v. *Carlin*, where the use of the words "*Irving Hotel*" upon coaches and badges was restrained, or *Marsh* v. *Billings*, where the use of the words "*Revere House*" was enjoined. In these cases and others there was an exclusive right to the use of the names of the hotels, out of which flowed the exclusive right to use the name on coaches, badges, etc.

The principle laid down in *Knott* v. *Morgan* was distinctly reiterated by Lord Langdale in *Croft* v. *Day*, **76**, who concluded an opinion as follows: —

"My decision does not depend on any peculiar or exclusive right the plaintiffs have to use the names of Day & Martin, but upon the fact of the defendant's using those names in connection with certain circumstances, and in a manner calculated to mislead the public, and to enable the defendant to obtain, at the expense of Day's estate, a benefit for himself, to which he is not in fair and honest dealing entitled."

The same view has been repeatedly expressed by the ablest English and American judges, and has long been settled law.

In *McLean* v. *Fleming*, **580**, Judge Clifford, delivering the unanimous opinion of the Supreme Court of the United States, said: —

"Nor is it necessary, in order to give a right to an injunction, that a specific trade-mark should be infringed; but it is sufficient that the court is satisfied that there was an intent on the part of the respondent to palm off his goods as the goods of the complainant."

See *Lee* v. *Haley*, **325**; *Williams* v. *Johnson*, **150**.

Held, (1.) that a plaintiff who sold medicines under a certain name was entitled to recover at least nominal damages from another person who had sold other medicines under that name, or had sold them, or placed them in the hands of others to be sold, "as and for" the plaintiff's medicines; (2.) but that there was no exclusive right to compound and sell an unpatented medicine; (3.) that there was no exclusive right in the name, if it had become generic and descriptive of a class of medicines; (4.) that the sale of inferior medicines under a name which had become generic and descriptive gave no right to another person selling medicines under the same name to recover damages, though his medicines had become discredited by the inferiority of the medicines sold under the same name; (5.) that a new trial must be granted.

Per Shaw, C. J. "The right to make and to sell is common to all, if no deceit is practised by one, in falsely assuming the name and credit of another." [1]

[1] The use of descriptive words for purposes of description is a common right which courts have uniformly refused to disturb; but the fact that a word is technically descriptive will not always justify its employment. It is thought the cases disclose a well-defined conflict of principle. The weight of authority is to the effect that a descriptive term may be employed by a defendant, even though it has long been associated with plaintiff's goods; and it has even been held that this is true where the term may have been selected by the defendant to enable him to trade upon plaintiff's reputation. The philosophy of this doctrine is, that the word having a natural signification which is as true in its application to one man's product as it is to another's, there can be no foundation for an exclusive right to use.

A number of the later cases proceed upon principles which are distinctly different. They assume that the fact that a word has been truthfully used by a defendant—that it is as true of A.'s goods as it is of B.'s—is not in itself enough; they go below the surface, and finding that the truth is used as a cloak for fraud, unmask and restrain the wrong. They rest, not upon the assumption that there must be a right of property, but upon the broad principle that equity abhors fraud, and will forbid the continuance of that in which fraud and injury are coexistent factors. See *Lee* v. *Haley*, **325**; *Williams* v. *Johnson*, **150**.

60. Pidding *v.* How.

June 21, 1837. *Shadwell, V. C. of E.* — 8 *Sim.* 477; 6 *L. J. Ch. N. S.* 345.

THE plaintiff having sold tea under the name of "*Howqua's Mixture*," and in packages marked in a special manner, the defendant began to sell tea under the same name, in similar packages.

On motion by the defendant to dissolve an injunction, which had been granted *ex parte* to restrain him from infringing the plaintiff's rights:

Held, that the plaintiff was *primâ facie* entitled to an injunction; but that the plaintiff having in his advertisements made a number of false representations to the public, with respect to the origin, composition, and value of his tea, the injunction ought not to have been granted until he had established his right at law, and must be dissolved, liberty being given to bring an action.

"It is a clear rule, laid down by courts of equity, not to extend their protection to persons whose case is not founded in truth." [1]

[1] Where the interposition of a court of equity is sought, the defence of inequitable conduct on the part of the complainant is a familiar one, and has been the subject of much discussion. There can be no doubt that where the trade-mark or label of the plaintiff involves the use of what may be justly regarded as an actual or constructive misrepresentation, such as is really calculated to mislead the public, or where the article is *malum in se*, a court of equity will leave the parties where it finds them.

There is little uncertainty in the application of the rule if the misrepresentation or fraud is clear; but it is often difficult to determine whether a departure from the strict letter of the truth is to be regarded as fraudulent. It is safe to say that courts have been disposed to require nothing more than substantial truth, and to refuse to be moved by defences of an artificial character. The rule is, probably, nowhere more clearly stated than in the case of *Meriden Britannia Company* v. *Parker*, 409, decided by the Supreme Court of Connecticut. It was there said: "Courts of equity will not protect a trade-mark that deceives the public. We do not suppose, however, that that deception need be of such a character as to work a positive injury to purchasers, nor, on the other hand, that *every erroneous impression which the public or a portion of the public may receive will be sufficient* to destroy the validity of a trade-mark. The question is, whether . . . . the representation is of *such a character* as to defeat the petitioner's claim to protection."

The classes of misrepresentation which have been passed upon are numerous.

It has been repeatedly held that a

61. Motley *v.* Downman.

July 5, 1837. *Lord Cottenham, C.* — 3 *My. & Cr.* 1; 6 *L. J. Ch. N. S.* 308.

THE plaintiff having been in the habit, while lessee of certain works at Carmarthen, of marking the boxes of tin plates

false use of the word "*patent*" will disentitle a plaintiff to relief. See *Leather Cloth Co.* v. *American Leather Cloth Co.* **223**. On the other hand, it has been held in a number of instances that the use of the same word as a descriptive designation, after the patent has expired, is not fraudulent. See *Edelston* v. *Vick*, **119**.

A misstatement as to the place of manufacture of an article is undoubtedly such a misrepresentation as will defeat a suit in equity, and this is often true where the misstatement is of the simplest character. In *Hobbs* v. *Francais*, **191**, the use of the word "*London*," upon an article made in New York, was held to be fatal to the plaintiff's suit. In *Palmer* v. *Harris*, **308**, the use of the word "*Habana*," upon cigars manufactured in America, was made the ground for dismissing the bill. In *Connell* v. *Reed*, **673**, a false use of the words "*East Indian*" was held to be fraudulent.

There are, however, many instances where geographical names used in a fictitious sense have been protected as trade-marks. The words "*Persian*," **78**, "*Chinese*," **109**, "*Liverpool*," **400**, "*Dublin*," **565**, with others, have been treated as valid, where there was no attempt to deceive, and the words as employed had not a geographical meaning. These cases do not conflict with the class of which *Newman* v. *Alvord*, **282** (which see), is an illustration; where it is ruled that there can be no strictly exclusive right to use a geographical word in a geographical sense.

Another line of decisions is that where the names of persons other than the manufacturers of the goods have been used upon the label. Of this class *Partridge* v. *Menck*, **91**, is a leading illustration, it there appearing that the plaintiff omitted his own name and used that of a person who had formerly been in his employ. The injunction was refused chiefly on this ground, although the difference in the labels was not without weight. Similar decisions have been made in a number of other cases; but here, as in the case of the use of the word "patent," well-defined distinctions have been recognized. In *Meriden Britannia Co.* v. *Parker*, *supra*, plaintiff's mark was "*Rogers Bros. A*;" the court treated the defence as insufficient, it appearing that the words were not used with any fraudulent intent, and that the manufacture of the company's goods was superintended by two brothers named Rogers, who had been connected with the firm of Rogers Bros., which firm had formerly used the mark. In *Dale* v. *Smithson*, **195**, Thomas Nelson Dale used the name Thomas Nelson & Co. on his labels, which was held to be an innocent use that did not prejudice his right.

The weight of authority is to the effect that the *bonâ fide* use of the name of a predecessor in business *as a trade-mark* is not to be regarded as fraudulent if the plaintiff is carrying on business at the establishment in connection with which the name had been used. In England the rule is well settled (*Leather Cloth Co.* v. *American Leather Cloth Co.* **223**); and in the Supreme Court of the United States, in *Kidd* v. *Johnson*, **669**, the learned author of the opinion, speaking of the right of a

there made with the letters "*M. C.*," and having afterwards removed his establishment forty miles off, where he continued

party to dispose of the use of his name in connection with the establishment where the goods were made, said: "We do not think there can be any reasonable doubt." So in *Dixon Crucible Co.* v. *Guggenheim*, **331**, the court ignored the defence that the words, "*Manufactured by Joseph Dixon & Company*," had been used while the article was made by the plaintiff corporation. A different rule may prevail where the manufacture of the goods has been divorced from the original establishment. See *Carmichael* v. *Latimer*, **521**.

The use of the name of a person, who has ceased to be connected with an establishment in the ordinary transaction of business, in such a way as to induce the belief that his connection has not terminated, will, however, usually be treated as a substantial misrepresentation. But in *Holmes, &c. Co.* v. *Holmes, Booth & Atwood Man. Co.* **340**, a Connecticut case, where a corporate name was used which imported that partners who had retired were still connected with the company, the court granted an injunction. It is not improbable that the existence of state enactments has been an important factor in the decision of some of the American cases in which this question has been considered. See *Hegeman & Co. &c.* **677**.

A substantial misrepresentation of the character of the article in connection with which the trade-mark is used is sufficient to prevent a recovery. In *Estcourt* v. *Estcourt Hop Essence Company*, **449**, the court said: "It is impossible not to see that these substances are introduced, recommended, and sold for the purpose of enabling brewers to supply to the public a liquid which they may represent to the public as being made with pure hops, when, in fact, it is not so made. It is not the province of the court to protect speculation of this kind." In *Laird* v. *Wilder*, **418**, an injunction was refused because plaintiff advertised his compound as free from all mineral and poisonous substances, whereas it contained an injurious mineral. In *Wolfe* v. *Burke*, **434**, it was held to be a fraud to represent what was substantially an alcoholic beverage as a medicine.

But in *Dixon Crucible Company* v. *Guggenheim*, **331**, a statement that the article was prepared from "pure carburet of iron," which seemed to be technically untrue, was treated as of no moment; and in *Colman* v. *Crump*, **579**, the Court of Appeals of New York declined to attach any significance to the fact that the plaintiffs had used the same designation upon mustard which contained a foreign substance as they had used upon mustard which was strictly pure. In *Apollinaris Co.* v. *Moore*, **678**, it was sought to defeat plaintiffs' right to an injunction by showing that it had used the word "*natural*" upon a water which it was urged was artificially prepared, but the defence was held to be insufficient, the court deciding that the word "natural" as used was certainly substantially true.

From the foregoing and other examples it is not difficult to formulate the conclusion that, in proceedings in equity, in the absence of special conditions, the question of misrepresentation is always one of fact. The principle on which the cases have been decided has not been departed from; it may appear to have been very differently interpreted; but where the plaintiff has failed, the controlling consideration has invariably been that to sustain his mark would be to countenance what was either substantially untrue or morally wrong.

The above discussion is to be taken as having relation to proceedings in equity or such as are tantamount thereto.

to use the same mark, the defendants, subsequent lessees of the Carmarthen works, began to mark their boxes with the letters "*M. C.*," and to call themselves "*The 'M. C.' Tin Plate Company.*"

Injunction, which had been granted on motion by the plaintiff, to restrain the defendants from the use of the initials and name, dissolved, liberty being given to bring an action, on the ground that there was at least a substantial question whether the plaintiff had not obtained the use of the mark only as a tenant of the works at Carmarthen, to which locality it was really attached, and that in all such cases the court of equity would not act otherwise than as ancillary to the court of law, the question being one of a legal right.

62. Vickery *v.* Welch.

October, 1837. *Mass. Sup. Ct.* — 19 *Pick.* 523.

THE defendant, having entered into a bond with the plaintiff to convey to him his chocolate mill, together with his exclusive right or secret of manufacture, subsequently declined to communicate the secret to the plaintiff, or to covenant not to communicate it to others.

Action of debt on the bond.

Held, that the defendant ought to have conveyed the exclusive right, with covenants to communicate the secret to the plaintiff, and not to others, and that the defendant's refusal had constituted a breach of the bond.

"It was contended for the defendant that this obligation was void as being in restraint of trade. But we cannot suppose that the case comes within that doctrine. The defendant claims to operate by a secret art. The public are not prejudiced by the transfer of it to the plaintiff. If it were worth anything, the defendant would use the art and keep it secret; and it is of no consequence to the public whether the secret art be used by the plaintiff or by the defendant."

63. Millington *v.* Fox.

March 24, 1838. *Lord Cottenham, C.* — 3 *My. & Cr.* 338.

THE plaintiffs and their predecessors in business having for many years carried on business as manufacturers of steel, which they stamped with the names and letters "*Crowley*," "*Crowley Millington*," "*J. H.*," the defendants marked other steel with the same marks and sold it so marked.

Injunction granted to restrain the defendants from continuing to use those marks, though they had acted without any fraudulent intention: but *Held*, that no costs could be given, since the plaintiffs had persevered with the suit after the defendants had offered to give them all to which they were entitled.

"I see no reason to believe that there has, in this case, been a fraudulent use of the plaintiffs' marks. It is positively denied by the answer, and there is no evidence to show that the defendants were even aware of the existence of the plaintiffs as a company manufacturing steel. . . . . In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names."

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64. Dougherty *v.* Van Nostrand.

July 15, 1839. *N. Y. Chancery: Hoffman, A. V. C.* — *Hoff.* 68.

PARTNERSHIP suit. *Held*, that the good-will of the business and lease of the partnership premises did not survive to the surviving partners, but were partnership property.

"Upon a sale of the lease of trading premises, the good-will of course enters into the value of the lease, and enhances the purchase money. In truth, in a lease of a trading establishment it constitutes a large part of the value."

65. Bell *v.* Locke.

January, 1840. *N. Y. Chancery: Walworth, C.* — 8 *Paige*, 75 ; *R. Cox*, 11.

THE plaintiffs being the proprietors and publishers of a newspaper called *The Democratic Republican New Era*, the defendant began to publish another paper under the name of *The New Era*.

Injunction to restrain the defendant from publishing his newspaper under that name refused, on the ground that there was no real probability of deception.[1]

66. Whittaker *v.* Howe.

January 18, 1841. *Lord Langdale, M. R.* — 3 *Beav.* 383.

THE defendant, a solicitor, having sold his practice to the plaintiff, and agreed not to practise as a solicitor in Great Britain for twenty years, nevertheless continued to practise as such.

On motion by the plaintiff, *Held*, that the agreement was not invalid, and that an injunction must be granted to restrain the defendant from practising in any part of Great Britain, and from endeavoring to induce the clients of the firm to cease to employ the firm.

67. Seeley *v.* Fisher.

February 5, 1841. *Lord Cottenham, C.* — 11 *Sim.* 581 ; 10 *L. J. Ch. N. S.* 274 ; 21 *Leg. Obs.* 474.

THE plaintiff being the owner of the copyright of Mr. Scott's Commentary on the Bible, and having brought out a fifth edition of the work, after the author's death, with his last improvements and corrections, the defendants reprinted the fourth edition, and in their advertisements reflected on the plaintiff's work as not containing the work of the author while still vigorous.

Injunction, which had been granted on motion by the

[1] See *Hogg* v. *Kirby*, 10.

plaintiff, dissolved, on the ground that the statements made by the defendants did not represent their work to contain any matter which was the plaintiff's exclusive property, under his copyright, and that, so far as they disparaged the plaintiff's work they merely amounted, if untrue, to a libel, for which the proper remedy was an action at law.[1]

68. Morison *v.* Salmon.

January 14, 30, 1841. *Common Pleas.* — 2 *Man. & G.* 385; 2 *Scott N. R.* 449; 10 *L. J. C. P.* 91.

THE plaintiffs being the proprietors and compounders of "*Morison's Universal Medicines*," which they sold in boxes, inclosed in wrappers bearing those words, the defendants sold other medicines in similar wrappers.

Action on the case.

A verdict having been found for the plaintiff, with one farthing damages, and the judge having certified for costs:

On motion for a new trial, *Held*, (1.) that the allegation that the defendant had used wrappers similar to those used by the plaintiffs, for the purpose of causing his medicines to be mistaken for the plaintiffs', disclosed a sufficient cause of action; (2.) and that, inasmuch as a right was in question, the judge had power at the trial to certify for costs, although the jury gave only one farthing damages.

Per Erskine, J. "The ground of action is not that the defendant prepared and sold medicine in imitation of '*Morison's Universal Medicine*,' but that he prepared and sold it under a false representation that it wast he article prepared and sold by the plaintiffs, whereby the plaintiffs were prevented from selling large quantities of their medicine. This is a good cause of action."

Per Maule, J. "The right is of a well-known description. It is not a general right to carry on a particular trade, but a right to protection which a party has who uses certain marks, and to the use of which he may have as good a right as though he were a patentee."[2]

[1] See *Lord Byron* v. *Johnston*, 23. [2] See *Burnett* v. *Phalon*, 277.

69. Ex parte Thomas.

July 21, 1841. *Court of Review in Bankruptcy: Sir J. Cross* — 2 *Mont., D. & De G.* 294; 10 *L. J. Bank'cy*, 75; 5 *Jur.* 967.

On petition in the bankruptcy of hotel keepers:

Held, that the good-will of a bankrupt's trade, so far as it was personal, remained with the bankrupt; so far as it was local, passed to the assignees in bankruptcy; and that, in the case in question, owing to the special circumstances, the assignees had not acquired any interest in the good-will.

"It is easy to conceive there to be such a thing as local good-will, arising from the habit which customers have been in of frequenting the same place. There is another kind of good-will which may be called personal, and this has been said to be incapable of sale. But there may be a good-will, like that in the present case, which is partly personal and partly local."

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70. Willett *v.* Blanford.

January 12, 1842. *Wigram, V. C.* — 1 *Hare*, 253; 11 *L. J. Ch.* 182; 6 *Jur.* 274.

Partnership suit. *Held*, that in ascertaining the interest to which the estate of a deceased partner was entitled in the profits of the business after his death, his capital not having been taken out, a variety of considerations must be regarded; but that where the business consisted substantially of good-will, the interest would usually be determined by the shares in the business.

P. 270. "The whole, or the substantial part, of a trade may consist in good-will, leading to renewals of contracts with old connections. In such a case it is the identical source of profit which operates both before and after dissolution; and this appears to me to be the groundwork of Lord Eldon's reasoning in *Cook* v. *Collingridge*."

71. Thornbury *v.* Bevill.

May 2, 1842. *Knight Bruce, V. C.* — 1 *Y. & C. Ch.* 554; 6 *Jur.* 407.

SPECIFIC performance of an agreement between two solicitors refused, on the ground of want of acceptance by the plaintiff.

P. 564. "This is not quite a case of dissolution of partnership, but something between a dissolution of the partnership and a purchase of the business; and notwithstanding the case of *Bunn* v. *Guy*, from which I do not mean to express dissent, decided as it was by judges of high authority, I am not prepared to say that it is fit that a court of equity should enforce an agreement between two solicitors, that one on retiring from the business shall permit the other to carry on business in his name. Whether such an agreement be or be not within the strict policy of the law, it may be doubtful whether this court ought to assist it."

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72. Crawshay *v.* Thompson.

May 26, 1842. *Common Pleas.* — 4 *Man. & G.* 357; 5 *Scott N. R.* 562; 11 *L. J. C. P.* 301.

THE plaintiff, an iron-master, marking his iron with the letters "*W. C.*" in an oval, the defendants, also iron-masters and merchants, sold other iron marked with the letters "*W. O.*" in an oval.

Action on the case.

A verdict having been found for the defendants, on motion for a new trial:

Held, (1.) that it was necessary for the plaintiff to prove fraudulent intention, and that the only evidence of this being the alleged resemblance, it had been properly left to the jury to say, first, whether there was such a resemblance as to deceive an ordinary purchaser, and injure the plaintiff, and second, whether there was fraudulent intention on the part of the defendants; (2.) that notice which had been given to the defendants by the plaintiff, that they were using a mark calculated to deceive, was evidence for the jury to consider with

regard to the defendants' intention, but could not of itself alter the legal rights of the parties, since it only informed the defendants of what was the plaintiff's opinion.[1]

73. Perry *v.* Truefitt.

December 9, 1842. *Lord Langdale, M. R.* — 6 *Beav.* 66; 1 *L. T.* 384.

THE plaintiff being the compounder of "*Perry's Medicated Mexican Balm*," the defendant began to make up and sell another compound under the name of "*Truefitt's Medicated Mexican Balm.*"

Motion by the plaintiff for an injunction to restrain the defendant from infringing his rights refused, with liberty to the plaintiff to bring an action, on the ground of misrepresentations contained in the plaintiff's show-cards as to the origin and substance of his composition.

"I think that the principle on which both the courts of law and of equity proceed, in granting relief and protection in cases of this sort is very well understood. A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark; but whether he has or not a property in the name or the mark, I have no doubt

[1] The importance of bearing in mind the substantial difference between a suit in equity and an action at law is made apparent by this case.

In an action at law it is, probably, essential to prove an intent to deceive; in a suit in equity, whatever may be true of the earlier cases, it is now settled that the intent is of no moment as affecting the right to an injunction. "Even where no fraud can be justly imputed, where the use of the name or style originated in mistake, and not in design, although the party may be exempted from damages and costs, the continuance of the use may be justly restrained, since it involves a violation of a right of property that, if persisted in, with a knowledge of the fact, would be fraudulent." Duer, J., in *Amoskeag Co.* v. *Spear*, 100.

This view has long been accepted as incontestable; if a trade-mark is property, it is plain that the fact that the defendant did not know of plaintiff's ownership is immaterial, except as affecting the question of damages.

that another person has not a right to use that name or mark for the purposes of deception, and in order to attract to himself that course of trade, or that custom which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using, the particular name or mark."[1]

74. England *v.* Downs.

December 17, 1842. *Lord Langdale, M. R.* — 6 *Beav.* 269 ; 12 *L. J. Ch.* 85 ; 6 *Jur.* 1075.

THE widow of a licensed victualler, who was carrying on the business, assigned her household goods, stock in trade, etc., prior to a second marriage, to trustees, upon trusts for herself and her daughters, excluding the second husband.

Suit by the daughters, after their mother's death, for the execution of the trusts of the settlement.

Held, that, under the circumstances of the case, the good-will passed to the trustees of the deed, and not to the husband ; as being incident to the stock and license, and not to the premises on which the business was carried on.

"This, in one way of looking at it, is the good-will. It is the chance or probability that custom will be had at a certain place of business, in consequence of the way in which that business has been previously carried on."

75. England *v.* Curling.

July 20, 1843 ; July 15, 1844. *Lord Langdale, M. R.* — 8 *Beav.* 129.

PARTNERSHIP suit.

Injunction granted to restrain the defendant Curling, between whom, the plaintiff, and another, there was a subsisting agreement for a partnership for a certain term, from carrying on business with the other defendants under the old firm name of "*Goodwin, Curling & Co.*," and from opening letters, etc., addressed to or intended for the old firm, and from publishing notices of the dissolution of the existing partnership until the expiration of the term for which it was to last.

[1] See *Pidding* v. *How*, 60.

76. Croft *v.* Day. (1.)

December 18, 1843. *Lord Langdale, M. R.* — 7 *Beav.* 84.

THE plaintiffs being the executors of the surviving partner in the firm of "*Day & Martin*," of 97 High Holborn, blacking manufacturers, who sold their blacking in bottles labelled with the name and address of the firm, the defendant obtained the authority of a man named Martin to use his name, and began to sell blacking in bottles labelled with the name and address "*Day & Martin*, 90½ *Holborn Hill*," in imitation of the genuine labels.

On motion by the plaintiffs, injunction granted to restrain the defendant from using labels or show-cards calculated to produce deception.

"It has been very correctly said that the principle in these cases is this — that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud.

"It is perfectly manifest that two things are required for the accomplishment of a fraud such as is here contemplated. First, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public; and, secondly, a sufficient distinctive individuality must be preserved, so as to procure for the person himself the benefit of that deception which the general resemblance is calculated to produce. To have a copy of the thing would not do; for though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which is improperly sought to be sold. For the accomplishment of such a fraud it is necessary, in the first instance, to mislead the public; and in the next place, to secure a

benefit to the party practising the deception, by preserving his own individuality." [1]

77. Croft *v.* Day. (2.)

July, 1844. *Lord Langdale, M. R.* — 28 *Leg. Obs.* 378.

On motion to commit the defendant in *Croft* v. *Day* (1) for breach of the injunction, it appearing that the plaintiffs had taken no notice of a form of label suggested by the defendant, which he proposed to adopt in place of the one against the use of which the injunction had been granted, and the plaintiffs alleging that the suggested alterations were merely colorable:

Held, that if the defendant was willing to make a proper distinction, and the plaintiffs refused to attend to his proposal, the court itself would determine whether the proposed distinction was sufficient.

78. Taylor *v.* Carpenter. (1.)

October, 1844. *U. S. C. C. Dt. of Mass.: Story and Sprague, JJ.* — 3 *Story*, 458; *R. Cox*, 14.

The plaintiffs being English manufacturers of thread, which they sold on spools labelled on the top with the words "*Taylor's Persian Thread*," and on the bottom with the name "*J. & W. Taylor, Leicester*," the defendant, an American citizen, made up similar spools of inferior thread and sold them similarly labelled.

Injunction granted to restrain the defendant from infringing the plaintiffs' rights, notwithstanding their alienage.

Per Story, J. "It is suggested that the plaintiffs are aliens. Be it so. But in the courts of the United States, under the Constitution and laws, they are entitled, being alien friends, to the same protection of their rights as citizens. There is no pretence to say that if a similar false imitation and use of the labels of a citizen, put upon his own manufactured articles, had been designedly and fraudulently perpetrated and acted upon, it would not have been an invasion of his

[1] See *Knott* v. *Morgan*, 57; *Williams* v. *Johnson*, 150.

rights, for which our law would have granted ample redress. There is no difference between the cases of a citizen and that of an alien friend, where his rights are openly violated." [1]

79. Coats *v.* Holbrook.

July, 1845. *N. Y. Chancery: Sandford, A. V. C.* — 2 *Sandf. Ch.* 586; 3 *N. Y. Leg. Obs.* 404; *R. Cox*, 20.

THE plaintiffs being Scotch thread manufacturers, who sold their thread on spools labelled (among other things) with the words "*J. & P. Coats' Best Six Cord*," the defendants, American commission merchants, made up inferior thread in a similar manner and similarly labelled.

Suit for an injunction.

Held, (1.) that the conduct of the defendants was intended and calculated to deceive; (2.) that the fact that the plaintiffs were aliens did not deprive them of their right to an injunction; (3.) that it was no defence to say that the purchasers from the defendants were informed that their article was spurious, since the statement did not pass to subsequent purchasers; (4.) that the injunction must, therefore, be granted; (5.) that with respect to the costs up to bill filed, the defendants must pay them, there being no necessity for the plaintiffs to have given them notice before filing their bill, and that the defendants must also pay the subsequent costs, an offer of submission by them having been imperfect.

80. Hine *v.* Lart.

January 12, 1846. *Shadwell, V. C. of E.* — 10 *Jur.* 106; 7 *L. T.* 41.

THE plaintiffs being hosiers, who sold a special kind of black stockings made on purpose for them, and marked with the word "*Ethiopian*" and six white lines, the defendants, also hosiers, began to sell stockings similarly marked.

Motion to dissolve an injunction on which had been granted

[1] The language of Judge Story in this case had the effect of setting at rest a defence which was probably presented with a knowledge that it had no foundation in reason or authority.

to restrain the infringement of the plaintiffs' marks refused; and *Held*, that although persons other than the plaintiffs, viz. the personal representatives of a deceased partner in the plaintiffs' firm, might have some interest in the marks, yet the plaintiffs had a sufficient interest in them to be entitled to sue.

81. Pierce *v.* Franks.

January 13, 1846. *Knight Bruce, V. C.* — 15 *L. J. Ch.* 122; 10 *Jur.* 25.

THE plaintiff dealing in certain kinds of brushes, which he stamped with the name and address, "*Smyth's, Bond Street*," the defendant sold other brushes similarly marked.

Suit for an injunction.

Held, (1.) that the injunction must be granted; (2.) that the plaintiff had not exceeded his right in filing his bill without previous communication with the defendant, and that the plaintiff was entitled to the costs of the suit, notwithstanding that the defendant said he would have submitted if application had been made to him; (3.) but that the defendant was entitled to whatever costs were occasioned by a particular unfounded allegation in the bill as to private marks.

82. Rodgers *v.* Nowill.

June 30, 1846; November 2, 1847; December 9, 1847. *Wigram, V. C.* — 6 *Hare*, 325. *Common Pleas.* — 5 *C. B.* 109; 17 *L. J. C. P.* 52; 11 *Jur.* 1039; 10 *L. T.* 88.

THE plaintiffs being cutlers, who stamped their cutlery with the name "*J. Rodgers & Sons*," with a crown and "*V. R.*" the defendants began to sell cutlery stamped with the same marks and the word "*Sheffield*."

Suit for an injunction. *Held*, that the bill must be retained for a year, leave being given to bring an action, the defendants claiming the name as their own firm name.

Action on the case. A verdict having been found for the plaintiffs, with forty shillings damages, on motion for a new trial:

Held, that the judge at the trial was right in directing the jury that the action was brought to try a right, and not to recover substantial damages, and also in leaving to them the following questions: (1.) Whether the mark as used by the defendants was calculated to deceive ordinary persons; (2.) whether they had adopted the particular form of deceit charged; (3.) whether they had acted with fraudulent intention; and that no allegation of special damage was required, and that the motion for a new trial must be refused.

On motion by the plaintiffs, injunction granted to restrain further infringements, with the costs of the proceedings at law and in equity, except the costs of the evidence in equity.

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83. Taylor *v.* Carpenter. (2.)

October, 1846. *U. S. C. C. Dt. of Mass.: Woodbury and Sprague, JJ.* — 2 *Wood. & M.* 1; *R. Cox*, 32; 9 *L. T.* 514.

THE plaintiffs, an English firm of thread manufacturers, marking their thread in a special manner, the defendant, an American citizen, sold other thread marked in imitation of the plaintiffs'.

Action on the case. A verdict having been returned for the plaintiffs, with substantial damages, on motion for a new trial:

Held, (1.) that the existence of a foreign custom to infringe American trade-marks, if established, would not debar an American court from protecting foreign trade-marks; (2.) that it was no defence that the defendant's goods were equal in quality to the plaintiffs'; (3.) that it was no defence for the defendant to say that he had informed the immediate purchasers that the mark on the goods was not genuine; (4.) that it was no defence to plead that the plaintiffs had delayed, unless the delay amounted to a license to use the marks, or an abandonment to the public; (5.) that actual damage having been suffered by loss of sales by the plaintiffs, they were entitled to recover more than nominal damages; (6.) but that

exemplary damages should not be given in an action for infringement of trade-mark.[1]

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84. Taylor *v.* Carpenter. (3.)

December, 1846. *N. Y. Chancery: Sandford, C. N. Y. Ct. of Errors.* — 2 *Sandf. Ch.* 603; 11 *Paige*, 292; *R. Cox*, 45.

THE defendant, an American citizen, sold spurious thread in America labelled with the same marks as those used by the plaintiffs, English thread manufacturers, on their "*Taylor's Persian Thread.*"

Injunction to restrain the defendant's infringement granted and affirmed.

And *Held*, (1.) that the trade-mark of an alien would be protected in the American courts; (2.) that the quality of the thread on which the spurious marks were placed was immaterial; (3.) that it was no defence for the defendant to say that he had informed the immediate purchaser that the marks were spurious.

Per Lott, Senator. "The object of the complainants' bill is to prevent the commission of a fraud, not only on them and to the prejudice of their rights, but on the public, by the sale of an article with an imitation of their trade-mark thereon, in such a manner as to deceive purchasers, and through the false representations thus held out to deprive the owners thereof of the profits of their skill and enterprise."

Per Spencer, Senator. "The right claimed by the complainants does not partake in any considerable, if in any degree, of the nature and character of a patent or copyright. . . . . The defendant is at full liberty to manufacture and vend the same kind of thread to any extent he pleases, and whenever he chooses. He is only required to depend for success upon his own character and fame. . . . . He is only required not to pirate upon the rights of others."

[1] See *McLean* v. *Fleming*, 580.

85. Spottiswoode *v.* Clarke.

December 11, 1846. *Lord Cottenham, C.* — 2 *Ph.* 154; 1 *Coop.* 254; 10 *Jur.* 1043; 8 *L. T.* 230–271.

THE plaintiff being the proprietor and publisher of "*The Pictorial Almanack*," the defendant published another almanac in a very similar wrapper, under the name of "*Old Moore's Pictorial Almanack*."

Injunction, which had been granted by the V. C. of E. to restrain the defendant from the publication of his almanac, dissolved, the defendant keeping an account, and the plaintiff having liberty to bring an action, on the ground that the court was dealing with a legal right, and that the consequences of an erroneous view of the legal right would be very serious to the defendant.[1]

1 Coop. 264. The possibility of acquiring an exclusive right in a general word, such as "Pictorial," "Illustrated," denied.

2 Ph. 157. "Take a piece of steel: the mark of the manufacturer from whom it comes is the only indication to the eye of the customer of the quality of the article. So it is of blacking, or any other article of manufacture, the particular quality of which is not discernible by the eye. But these cases are quite different from the present case, in which, if you are deceived at all, it is not by the eye."

86. Routh *v.* Webster.

January 28, 1847. *Lord Langdale, M. R.* — 10 *Beav.* 561; 11 *Jur.* 701; 9 *L. T.* 491.

THE defendants, being the provisional directors of a joint stock company called "*The Economic Conveyance Company*," published a prospectus in which the plaintiff's name appeared as a trustee of the company, without his authority.

On motion by the plaintiff, injunction granted to restrain the defendants from using the plaintiff's name, without his authority, in their prospectus, or so as to identify him with the company.

[1] See *Hogg* v. *Kirby*, **10.**

87. Franks *v.* Weaver.

March 10, 1847. *Lord Langdale, M. R.* — 10 *Beav.* 297; 8 *L. T.* 510.

THE plaintiff being the inventor and compounder of "*Franks' Specific Solution of Copaiba*," which he sold in wrappers containing that title, directions for use, testimonials, etc., the defendant began to sell another preparation, which he called "*Chemical Solution of Copaiba*," and placed in wrappers in which he made use of the plaintiff's name and testimonials in such a manner as to lead, *primâ facie*, to the belief that they were applicable to the defendant's preparation, though on a close examination it appeared that they were used by him in praise of the genuine article, with which his own was compared.

On motion by the plaintiff, injunction granted to restrain the defendant from acting so as to deceive.

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88. The London and Provincial Law Assurance Society *v.* The London and Provincial Joint Stock Life Assurance Company.

November 11, 1847. *Shadwell, V. C. of E.* — 17 *L. J. Ch.* 37; 11 *Jur.* 938; 10 *L. T.* 127.

MOTION for an injunction to restrain the defendants from using the first three words of the title of their company refused, and an action directed to be brought, on the ground that no deception or damage was probable, and that there was a doubt as to a sufficient length of user by the plaintiffs.

"The principles, I apprehend, are clear, that the court will always have regard to this, whether there has been such an exclusive right to a name on the part of the plaintiffs as to justify the court in interfering in a summary way against the defendants; and the court will consider whether, taking all the names together, it is or is not apparent that there is such a deceptive quality as is likely to produce the injury complained of."

89. Guinness *v.* Ullmer.

November 11, 1847. *Shadwell, V. C. of E.* — 10 *L. T.* 127.

THE plaintiffs being porter brewers at Dublin, the defendants, who were engravers, engraved blocks or plates in imitation of those from which the labels placed on the plaintiffs' porter were printed.

On motion by the plaintiffs, injunction granted to restrain the defendants from making or disposing of any such blocks or plates.

"If a thing contains twenty-five parts, and one only is taken, such an imitation will be sufficient to contribute to a deception, and the law will hold those responsible who have contributed to the fraud."

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90. Fowle *v.* Spear.

November, 1847. *U. S. C. C. E. Dt. of Penn.: Kane, J.* — 7 *Penn. L. J.* 176; *R. Cox*, 67.

MOTION for injunction to restrain the use of wrappers, labels, and bottles, similar to those in which a quack medicine called "*Wistar's Balsam of Wild Cherry*" was contained, refused, on the ground of misrepresentations by the plaintiff as to the quality and properties of his medicine.

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91. Partridge *v.* Menck.

January, 1848. *N. Y. Chancery: Sandford, V. C.; Walworth, C. N. Y. Ct. of App.* — 2 *Sandf. Ch.* 622; 2 *Barb. Ch.* 101; 1 *How. App. Cas.* 558; *R. Cox*, 72.

ORDER dissolving an injunction which had been granted on motion by the maker of "*A. Golsh's Friction Matches*," to restrain the sale of matches in boxes labelled "*Menck & Backus' Friction Matches, late Chemist to A. Golsh*," affirmed, on the ground, (1.) that ordinary purchasers would not be deceived; (2.) that the plaintiff was disentitled by reason of his continuing to use the name of Golsh, to whose business he had succeeded, after the latter had ceased to be connected with the business.

Per Walworth, C. "The question in such cases is not whether the complainant was the original inventor or proprietor of the article made by him, and upon which he now puts his trade-mark, or whether the article made and sold by the defendant under the complainant's trade-mark is an article of the same quality or value. But the court proceeds upon the ground that the complainant has a valuable interest in the good-will of his trade or business; and that, having appropriated to himself a particular label, or sign, or trade-mark, indicating to those who wish to give him their patronage that the article is manufactured or sold by him or by his authority, or that he carries on business at a particular place, he is entitled to protection against a defendant who attempts to pirate upon the good-will of the complainant's friends or customers, or the patrons of his trade or business, by sailing under his flag without his authority or consent." [1]

92. Purser *v.* Brain.

January 21, 1848. *Shadwell, V. C. of E.* — 17 *L. J. Ch.* 141.

THE plaintiffs, trading under the name of "*The London Manure Company*," the defendants began to trade as "*The London Patent Manure Company*," and to issue circulars imitated from the plaintiff's.

On motion by the defendants, an injunction which had been granted on motion by the plaintiffs, to restrain the defendants from the use of their name, and from issuing such circulars, dissolved, and an action at law directed, on the ground that there might be a question as to the plaintiffs' having acquired an exclusive right by length of user, which ought to be considered by a jury.

93. Clark *v.* Freeman.

January 31, 1848. *Lord Langdale, M. R.* — 11 *Beav.* 112; 17 *L. J. Ch.* 142; 12 *Jur.* 149; 11 *L. T.* 22; 35 *Leg. Obs.* 436.

THE plaintiff, Sir James Clark, being an eminent physician, who did not compound or sell pills, the defendant began

[1] See *Pidding* v. *How*, 60.

to compound and sell a quack medicine as "*Sir J. Clarke's Consumption Pills.*"

Motion by the plaintiff for an injunction to restrain the defendant from so doing refused, on the ground that there was no right of property to be protected, and that the court had no jurisdiction to stay the publication of a libel, the remedy for which must be sought at law.

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94. Fleming *v.* Newton.

February 17, 1848. *Ct. of Session.* — *Ct. of Sess. Cas. 2d Ser. VIII.* 677. *House of Lords* — 1 *H. L. C.* 363.

THE respondent's name was placed upon the register of protests for non-acceptances of bills of exchange.

Interdict to restrain, so far as the respondent's name was concerned, the publication of a copy of the register granted by the Court of Session, but rescinded by the House of Lords, on the ground that the question of defamation was one for a jury.

Per Lord Cottenham, C. (1 H. L. C. 376). "The liberty of the press consists in the unrestricted right of publishing, subject to the responsibilities attached to the publication of libels, public or private. But if the publication is to be anticipated and prevented by the intervention of the Court of Session, the jurisdiction over libels is taken from the jury, and the right of unrestricted publication is destroyed."

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95. Bullock *v.* Chapman.

March 1, 1848. *Knight Bruce, V. C.* — 2 *De G. & Sm.* 211; 12 *Jur.* 738; 11 *L. T.* 326.

MOTION by the plaintiff for an injunction to restrain a banking company from returning his name to the Stamp Office, under 7 & 8 Vict. c. 113, among the names of the shareholders in the company, he alleging that he had ceased to be a shareholder, refused, on the ground that the plaintiff's case was not clearly proved, and that, in any case, the apprehended damage would not be irreparable.

96. Wedgwood *v.* Smith.

1848. *Shadwell, V. C. of E.*

THE plaintiff being a manufacturer of pottery, which he marked with his name, "*Wedgwood*," the defendant began to sell other pottery marked "*Wedgwood*," or "*Wedgewood*."

Injunction granted to restrain the defendant from infringing the plaintiff's mark.

97. Scoville *v.* Toland.

1848. *U. S. C. C. Dt. of Ohio.* — 6 *West. L. J.* 84.

THE defendant imitated the labels used by the plaintiff on certain medicines prepared by him.

Injunction to restrain the defendant from so doing refused, on the ground that the case was not within the jurisdiction of the Circuit Court; and *Held*, that such labels were not capable of protection by means of the provisions of the Copyright Acts, though an application of them to spurious medicines would be restrained on general grounds by the proper court.

98. Prince Albert *v.* Strange.

January 16, February 8, June 2, 1849. *Knight Bruce, V. C.* — 2 *De G. & Sm.* 652; 13 *Jur.* 45–507; 12 *L. T.* 367; 13 *L. T.* 341; 37 *Leg. Obs.* 276. *Lord Cottenham, C.* — 1 *Mac. & G.* 25; 1 *H. & Tw.* 1; 8 *L. J. Ch.* 120; 13 *Jur.* 109; 12 *L. T.* 441; 37 *Leg. Obs.* 394.

THE defendant published a catalogue of certain etchings executed by the plaintiff, some copies of which had been obtained surreptitiously and by breach of trust, the catalogue being so framed as to lead to the belief that the defendant was acting with the plaintiff's consent.

On motion by the plaintiff, injunction granted to restrain the exhibition of the etchings and publication of the catalogues; and *Held*, that the Court of Chancery would exercise an original and exclusive jurisdiction to restrain the publication, not only of unpublished compositions which the author

desired to keep private, but also of any catalogue or description of them made and published without his consent.[1]

99. Coffeen *v.* Brunton. (1.)

May, 1849. *U. S. C. C. Dt. of Ind.: McLean, J.* — 4 *McLean*, 516; *R. Cox*, 82.

THE plaintiff being the inventor and proprietor of a medical preparation which he called "*The Chinese Liniment*," the defendant began to make and sell another preparation under the name of "*The Ohio Liniment*," in bottles labelled with directions, etc., similar to those on the plaintiff's bottles, and made other misrepresentations calculated to deceive, in advertisements and handbills.

On motion by the plaintiff injunction granted to restrain the defendant from using such directions and making such misrepresentations; and *Held*, (1.) that without a patent there could be no exclusive right of manufacture; (2.) that where a trade-mark was infringed some damages must be given at law, though no specific injury was proved.

"It would seem that an intentional fraud is not necessary to entitle the plaintiff to protection, but that where the same mark or label is used which recommends the article to the public by the established reputation of another who sells a similar article, and the spurious article cannot be distinguished from the genuine one, an injunction will be granted, although there was no intentional fraud. And I am inclined to think that this is a correct view of the principle, for the injury will be neither greater nor less by the knowledge of the party."[2]

[1] See *Lord Byron* v. *Johnston*, **23**.

[2] This was not a trade-mark case, in the strict sense of the term, but was decided upon the ground that the defendant had imitated the descriptive parts of the plaintiff's label in such manner as to create an impression that his liniment was the liniment made by the plaintiff. The court said, that "from the body of the label it was plain that the defendant had so assimilated the language employed by the plaintiff" that it could not be doubted that the purpose was to trade upon the plaintiff's reputation. The injunction restrained the defendant from using labels, directions, advertisements, or handbills calculated to lead the public to suppose that his "*Ohio*" liniment was the "*Chinese*" liniment made by the plaintiff.

The case of *Falkinburg* v. *Lucy*, **296**, decided by the Supreme Court of California, was a similar case. The court there dissolved an injunction which had been granted in the court below, be-

100. The Amoskeag Manufacturing Co. *v.* Spear.

October, 1849. *N. Y. Super. Ct.: Duer, J.* — 2 *Sandf. S. C.* 599 ; *R. Cox*, 87.

THE plaintiff company manufacturing cotton tickings, which they sold with a printed label affixed on which the letters "A. C. A." were prominent, the defendants began to sell a similar article similarly labelled.

On motion by the defendants to dissolve an injunction, which had been granted to restrain the defendants from using labels similar to those of the plaintiffs, or having thereon the letters "A. C. A.:"

Held, (1.) that a partial imitation would be restrained, if it was calculated to deceive ; (2.) that a gratuitous acquiescence by the owner of a trade-mark in its use by another was in the nature of a license which was revocable and might be withdrawn ; (3.) that the labels in question were, as a whole, calculated to deceive, and that the injunction must be maintained as to them, but that as far as it regarded the letters "A. C. A.," which were merely indicative of quality, and could not be appropriated, it must be dissolved until an action at law should result in the plaintiff's favor.

"The manufacturer's trade-mark is an assurance to the public of the quality of his goods, and a pledge of his own integrity in their manufacture and sale. To protect him, therefore, in the exclusive use of the mark that he appropriates is not only the evident duty of a court as an act of justice, but the interests of the public, as well as

cause there was no technical trade-mark involved, the case having been brought under a statute of California providing for the protection of technical trade-marks. It is not improbable that had the plaintiff proceeded at common law, a different conclusion would have been arrived at. There may seem to be a conflict of opinion among the cases as to the right of a person to be protected against deception by a simulation of descriptive matter, but it will be found that in probably every instance where the plaintiff has not prevailed it has been because of a misconception in bringing his suit, or because he has failed in his proofs.

This line of cases is not to be confounded with the class of which *Amoskeag Co.* v. *Spear*, **100**, is the leading American example, where labels approximating nearer to technical trade-marks have been passed upon and protected.

of the individual, require that the necessary protection shall be given."

"The owner of an original trade-mark . . . . has no right to an exclusive use of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their name or quality."

"In an imitation of the original mark upon an article, or goods of the same description, the name of the proprietor may be omitted, — another name, that of the imitator himself, may be substituted; but if the peculiar device is copied, and so copied as to manifest a design of misleading the public, the omission or variation ought to be wholly disregarded. Its object, we may be certain, was not to communicate the truth, but to escape the penalty of falsehood. A fraud is intended, an unlawful gain is meant to be realized, but it is believed or hoped that an injunction may be avoided, and a claim for profits or damages be repelled. The fraud, however, if a court of equity is true to its principles, will be suppressed, and its fruits be intercepted or restored. My conclusions on this branch of the subject are: that an injunction ought to be granted whenever the design of a person who imitates a trade-mark, be his design apparent or proved, is to impose his own goods upon the public as those of the owner of the mark, and the imitation is such that the success of the design is a probable or even possible consequence; and that an injunction must be granted whenever the public is in fact misled, whether intentionally or otherwise, by the imitation or adoption of marks, forms, or symbols which the party who first employed them had a right to appropriate; and this for the plain reason, that when a right of property has been thus acquired it must be protected." [1]

[1] This case is justly regarded as the leading American adjudication, especially as defining the doctrine of infringement. It is not going too far to say that the doctrines of the opinion have remained unshaken; there have been departures from time to time, some of them of a notable character, but the principles formulated by Judge Duer have not been permanently varied. The case of *Partridge* v. *Menck*, **91**, decided by the court of last resort of New York in 1848, contemporaneously with the principal case, in which it was in effect held that to constitute infringement there must be such a similarity as would mislead a person exercising exceptional caution, would have given form to a permanent digression, had it been possible. Although the opinion in that case was by a court of last resort, the decision was singularly unproductive of effect. It was followed in the *Merrimac Manufacturing Company* v. *Garner*, **134**, in the General Term of the Supreme Court of New York a few years later, and to some extent in other adjudications, but not,

101. Rudderow *v.* Huntington.

October, 1849. *N. Y. Super. Ct.* — 3 *Sandf. S. C.* 252 ; *R. Cox*, 106.

THE plaintiffs, auctioneers, having sold certain boxes of what was supposed to be, and was labelled as, "*Thompson's*

it is believed, in any instance by the court of final appeal of the state. On the contrary, the view announced in the Amoskeag case was accepted without regard to the more authoritative precedent in *Burnett* v. *Phalon*, **277** ; *Newman* v. *Alvord*, **282** ; *Colman* v. *Crump*, **579**, and other cases, the line having, it may be safely said, remained unbroken until the present time. It is not improbable that judicial remark may be found which is not in perfect accord with what has been stated to be the accepted view ; but it is undoubtedly true that the great weight of authority fully sustains the comprehensive rule laid down at the beginning.

In *Colman* v. *Crump*, **579**, in the Court of Appeals of New York in 1878, which is the last decision of that court on the subject of infringement, the principal case is pointedly affirmed.

The rule as laid down in New York has been unreservedly recognized in Connecticut, without variation (*Mer. Britannia Co.* v. *Parker*, **409**), and to all the intents and purposes in the courts of all the other states in which trade-mark cases have arisen. *Lowell Man. Co.* v. *Lowell Hosiery Mills*, **676**.

The recent cases in the federal courts are not less liberal. In *McLean* v. *Fleming*, **580**, decided by the Supreme Court in 1877, Judge Clifford, writing for the court, uses the following language : —

"Positive proof of fraudulent intent is not required where proof of infringement is clear, as the liability of the infringer arises from the fact that he is enabled, through unwarranted use of the trade-mark, to sell a simulated article as and for one which is genuine. Nor is it necessary, in order to give a right to an injunction, that a specific trade-mark should be infringed ; but it is sufficient that the court is satisfied that there was an intent on the part of the respondent to palm off his goods as the goods of the complainant.

"Difficulty frequently arises in determining the question of infringement ; but it is clear that exact similarity is not required, as that requirement would always enable the wrong-doer to evade responsibility for his wrongful act.

"Colorable imitation, which requires careful inspection to distinguish the spurious trade-mark from the genuine, is sufficient to maintain the issue. . . . . Where the similarity is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the ordinary purchaser in the exercise of ordinary care and caution in such matters, it is sufficient to give the injured party a right of redress."

In the case of *Consolidated Fruit Jar Co.* v. *Thomas*, **668**, an opinion of exceptional value was delivered in which Judge Nixon writes : —

"It is not necessary for the complainant to show an exact imitation. . . . . No matter how vague may be the resemblance, if it be sufficient to mislead the public, it is unlawful ; and when unexplained, it is the duty of the court to infer intent, and to hold that the resemblance was adopted for the purpose of deception." See, also, *Royal Baking Powder Co.* v. *McQuade*, **674**.

Not less advanced are the recent English cases, although there may appear to be instances which point toward the application of a more exact rule. In *Orr*

Eye Water ;" but without any warranty or false representation, the purchaser, who had given a promissory note for the price, discovered the lotion and labels to be spurious, and refused to pay for it.

Action on the note. *Held*, that the plaintiffs being ignorant of the fraud, and having made no warranty or false representation, were entitled to recover the price.

102. Smale *v.* Graves.

February 14, 1850. *Knight Bruce, V. C.* — 3 *De G. & Sm.* 706; 19 *L. J. Ch.* 157; 14 *Jur.* 662; 15 *L. T.* 179.

THE defendant, being the widow and acting executrix of a surgeon dentist, agreed to sell to a person, as his successor, the good-will of the practice and an introduction to the patients, for an annuity of £100 for five years, to be paid by half-yearly instalments, to be secured by mortgage.

Administration suit. *Held*, that if not the whole, at any rate some part of the annuity belonged to the estate.

103. Davis *v.* Kendall.

September, 1850. *Rhode I. Sup. Ct.* — 2 *R. I.* 566; *R. Cox*, 112.

THE plaintiff, being the original inventor and manufacturer of "*Perry Davis' Pain Killer*," the defendant began to make and sell another article as "*Perry's Vegetable Pain Killer*," and in bottles similarly labelled to the plaintiff's.

Action on the case. *Held*, that the plaintiff was entitled to judgment.

Per Greene, C. J. "All are entitled to make and vend this compound, and to vend it as a similar article to that made and sold by the plaintiff; but no one but the plaintiff has a right to sell it as a medicine manufactured by the plaintiff. The adoption of the same label as the plaintiff's will, of course, be actionable; and so the adoption of a label so like the plaintiff's as to mislead the public would

v. *Johnston*, 646, and *Thorley's Food Co.* v. *Massam*, 671, what is to be taken to be the rule in England is perspicuously stated.

be actionable. If the difference be merely colorable, it will not avail the defendant." [1]

104. Stone *v.* Carlan.

1850. *N. Y. Super. Ct.: Campbell, J.* — 13 *Monthly L. R.* 360; *R. Cox*, 115.

THE plaintiffs being coach-proprietors, who had contracted with the proprietors of "*The Irving Hotel*," at New York, for the conveyance to and fro of their visitors, and for the use of their name and that of their hotel upon their coaches and their servants' badges, the defendants used the names "*Irving Hotel*," "*Irving House*," "*Irving*," etc., upon their coaches and servants' badges.

On motion by the plaintiffs, injunction granted to restrain the defendants from so doing.[2]

105. Jollie *v.* Jaques.

October, 1850. *U. S. C. C. S. Dt. of N. Y.: Nelson, J.* — 1 *Bl. C. C.* 618.

SUIT under the U. S. Copyright Act of 1831, to restrain an imitation of a musical composition entitled "*The Serious Family Polka*."

It having been decided that the plaintiff's claim to copyright could not be supported: *Held*, that the plaintiff not being entitled to the copyright in the composition, he was not entitled to protection in respect of the title.

"The title or name is an appendage to the book or piece of music for which the copyright is taken out, and if the latter fails to be protected, the title goes with it, as certainly as the principal carries with it the incident." [3]

[1] See *Davis* v. *Kennedy*, **281**.

[2] See *Howard* v. *Henriques*, **108**.

[3] Whatever right of property there is in any symbol or word, wherever found, or in any thing that serves to individualize an article, depends upon principles analogous to those which underlie the law of trade-marks.

But the name of a book is never a trade-mark, and cannot be. For if it is, it is a common law right which is of the same force in Great Britain as in the United States, and the author may protect it in both countries. This he cannot do, for the reason that the right to *print* a literary composition involves

106. Holloway *v.* Holloway.

November 9, 1850. *Lord Langdale, M. R.* — 13 *Beav.* 209

THE plaintiff, Thomas Holloway, manufacturing and selling pills and ointment at 244 Strand, as "*Holloway's Pills and Ointment*," the defendant, his brother, Henry Hollo-

the right to *call it what it is*. Or, as here decided, where a copyright fails, the right to the name of the work fails also, the two becoming *publici juris* at the same time. There would be a species of fraud in an American reprint of "*Ivanhoe*," under the title of "*The Knight of the Black Plume*," and yet no remedy of any sort. But to publish the story of "*Uncle Tom's Cabin*" under the title of "*Aunt Chloe's Home*" would be an invasion of the copyright law; while to print another novel under the name of "*Uncle Tom's Cabin*" would be an injury involving a remedy of an entirely different nature. In the instance last mentioned there would be no violation of the copyright, but an infraction, to all intents and purposes, of a trade-mark.

But how can the injury be an invasion of a right at common law, and yet be confined to this country? The answer to this is, that the exclusive right flows from a statutory privilege. The author acquires the sole right to *print* the book, and the sole right to *call it by its proper name* is an inseparable incident which remains in him, *ex necessitate rei*, as long as he alone can produce it. The sale of another book under the name of one which no other person has the right to sell is a misrepresentation, accompanied by a loss of sales, and an actionable injury under the principles which govern the law of trade-marks. The theory is not unlike that laid down in a number of cases. In the Congress Spring case, **854**, it was decided that the word "*Congress*," when applied to water, was the property of the proprietors of Congress Spring, because "*Congress water*" could only be obtained from Congress Spring, and Congress Spring belonged to the plaintiffs.

But it is quite apparent that, in order to be susceptible of protection, the title of a book must be distinctive, and not descriptive. That is, it must be original in itself, or in its application, and not a mere statement of a fact that would be equally true of other and different books. To illustrate: "*The Life of Thackeray*" could not be monopolized, as it is a mere statement of a fact that is essentially *publici juris*; but "*Evenings with Thackeray*" would be of a different nature, and analogous to a trade-mark, the words being invested with a secondary meaning, having relation to a particular volume, and which would be untrue in their application to any other.

In addition to the title, under the restrictions mentioned, the names of editions may be protected, as they are in a true sense trade-marks; but, in respect of designations of this class, the same doctrines obtain as in the case of other trade-marks, and they are without legal qualities unless of an arbitrary nature at the time of their application. Thus, "*The Riverside Edition*" is good as a mark irrespective of the copyright law. "*Bric-à-Brac Series*" would have been equally valid had it been used to denote an *edition*, the edition of a particular house, and not as a *title* to signify a particular *collocation*. But "*American Edition*" would be without a single element of force.

The leading points above stated have never been fully examined by the courts. They are, however, deductions that are based upon established principles. See *Hogg* v. *Kirby*, **10**.

way, began to sell other pills and ointment at 210 Strand, as "*H. Holloway's Pills and Ointment*," the pill-boxes, pots, labels, and wrappers being similar to those used by the plaintiff.

On motion by the plaintiff for an injunction to restrain the defendant from infringing the plaintiff's rights:

Held, (1.) that the defendant's conduct was intended and calculated to deceive; (2.) that the fact that the defendant's name was the same as the plaintiff's did not entitle him so to act; (3.) that the assumption by the plaintiff, without authority, of the title of "*Professor*," and some exaggerated commendations of his medicines did not disentitle him; (4.) that the injunction must be granted; (5.) that the defendant alleging that he had not had time to answer the plaintiff's affidavits, liberty must be given him, expressed in the order, to move to dissolve the injunction.

"The defendant's name being Holloway he has a right to constitute himself a vendor of Holloway's pills and ointment, and I do not intend to say anything tending to abridge any such right. But he has no right to do so with such additions to his own name as to deceive the public, and make them believe that he is selling the plaintiff's pills and ointment."

"I do not mean to say that I have any sort of respect for this sort of medicines. I have none; but the law protects persons from fraudulent misrepresentations, and this is a species of property which the law does allow, and so long as the law recognizes it, it must be protected, and persons in the situation of the defendant will not be allowed to practise a fraud like that here complained of."

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107. Foot *v.* Lea.

December 5, 1850. *Smith, M. R. of I.* — 13 *Ir. Eq.* 484.

THE petitioners, Lundy Foot & Co., being Dublin snuff manufacturers, who used a show-board over their door, and placed labels on their packets of snuff, on each of which their name appeared, the respondent, who had formerly been in their employ, opened a shop in Dublin, and styled

himself on the show-board over his door, and on the labels on his packets of snuff, "*A. Lea, late of Lundy Foot & Co.*," the words "late of" being much smaller than the rest.

Petition for an injunction to restrain the respondent from so doing dismissed, on the ground that the question was one of a legal right which must be decided at law.

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108. Howard *v.* Henriques.

March, 1851. *N. Y. Super. Ct.* — 3 *Sandf. S. C.* 725; *R. Cox*, 129.

THE plaintiff, being the proprietor of a hotel at New York, called the "*Irving House*," *or* "*Irving Hotel*," the defendant opened another hotel at New York under the same name.

Motion by the defendant to dissolve an injunction which had been granted, on motion by the plaintiff, to restrain the defendant from so doing, refused.

Per Campbell, J. "We think that the principle of the rule is the same, to whatever subject it may be applied, and that a party will be protected in the use of a name which he has appropriated, and by his skill rendered valuable, whether the same is upon articles of personal property which he may manufacture, or applied to a hotel where he has built up a prosperous business."[1]

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109. Coffeen *v.* Brunton. (2.)

May, 1851. *U. S. C. C. Dt. of Ind.: McLean, J.* — 5 *McLean*, 256; *R. Cox*, 132.

THE plaintiff being the proprietor of a medical preparation called "*The Chinese Liniment*," the defendant began to sell another preparation under the name of "*The Ohio Liniment*," in bottles similarly labelled.

[1] Upon recognized principles, the following names have been protected: "WHAT CHEER HOUSE," **212**; "REVERE HOUSE," **111**; M'CARDELL HOUSE," **233**; "PRESCOTT HOUSE," **266**; "CARRIAGE BAZAAR," **294**; "OSBORNE HOUSE," **323**; "WOOD'S HOTEL," **467**; "BOOTH'S THEATRE," **524**; "ASHFORD LODGE," **631**.

Protection to the name "STATION HOTEL," **520**, was refused, on the ground that it was descriptive.

Injunction to restrain the defendant from so doing refused, on the ground that the defendant was originally concerned with the plaintiff in bringing out the lotion, that a partnership between them had been in contemplation, and that it was at least probable that the defendant was acquainted with the composition of the plaintiff's lotion, so that the plaintiff should be required to try his right at law in the first place.

"To entitle a complainant to protection against a false representation, it is not essential that the article should be inferior in quality, or that the individual should fraudulently represent it so as to impose upon the public; but if by representation it be so assimilated as to be taken in the market for an established manufacture or compound of another, the injured person is entitled to an injunction. The injury is not the less, though the false representations be made without a knowledge of such interference."

110. Morison *v.* Moat.

August 20, 1851; January 22, 1852. *Turner, V. C.* — 9 *Hare*, 241; 20 *L. J. Ch.* 513; 15 *Jur.* 787. *Knight Bruce and Lord Cranworth, L. JJ.* — 21 *L. J. Ch.* 284; 16 *Jur.* 321.

THE plaintiffs being two of the surviving partners in the firm of Morison, Moat & Co., and the legatees of the secret recipe and prescription of an unpatented medicine called "*Morison's Universal Medicine*," the defendant, who was the third surviving partner in the firm, began, after the dissolution of the partnership, to use the secret recipe, and sell the medicine under the same name, having made himself acquainted with the secret through a breach of confidence on the part of a third person.

On motion by the plaintiffs, injunction granted to restrain the defendant from using the secret recipe or selling any medicine under the name; and *Held*, that a defence of delay on the part of the plaintiffs failed.

Per Turner, V. C. (9 Hare, 258). "What we have to deal with here is, not the right of the plaintiffs against the world, but their right against the defendant. It may well be that the plaintiffs have

no title against the world in general, and may yet have a good title against this defendant."

Per Lord Cranworth, L. J. (21 L. J. Ch. 248). "There is no doubt whatever that where a party who has a secret in a trade employs persons under contract express or implied, or under duty express or implied, those persons cannot gain the knowledge of that secret and then set it up against their employer."

111. Marsh *v.* Billings.

March, 1852. *Mass. Sup. Ct.* — 7 *Cush.* 322; 14 *Monthly L. R.* (4 *N. S.*) 664; *R. Cox*, 118.

THE plaintiffs being coach-proprietors, who had purchased from the proprietor of "*The Revere House*" hotel, at Boston, the exclusive right of conveyance of the visitors to that hotel, and the use of the name of the hotel on their coaches, servants' badges, etc., the defendants, who had had the same right previously to the plaintiffs, continued to act in the same manner after the right had passed to the plaintiffs.

Action on the case.

Held, that the defendants were entitled to convey passengers freely, but that they were not entitled to falsely represent themselves as having the patronage of the proprietor of the establishment; and that the plaintiffs were entitled to recover such damages as the jury, upon the whole evidence, should be satisfied that they had sustained, and not merely for the loss of such passengers as could be actually proved to have been diverted from their coaches to the defendants'." [1]

112. Lumley *v.* Wagner.

May 20, 26, 1852. *Parker, V. C.* — 5 *De G. & Sm.* 485. *Lord St. Leonards, C.* — 1 *De G., M. & G.* 604; 21 *L. J. Ch.* 898; 16 *Jur.* 871.

THE plaintiff being a theatrical manager, the defendant, a singer, agreed with him to sing at his theatre for a certain period, and there only, but subsequently agreed to sing at another theatre before that period had elapsed.

[1] See *Howard* v. *Henriques*, **108.**

On motion by the plaintiff, injunction granted to restrain the defendant from singing elsewhere without permission, during the existence of the agreement; and *Held*, that the positive and negative stipulations formed one contract, and that the violation of the negative stipulation would be prevented, though the specific performance of the entire agreement could not be enforced.

113. Farina *v.* Shaw.

June 3, 1852. *Parker, V. C.* — *Cited* 3 *Eq. Rep.* 886-7; 1 *K. & J.* 514; 24 *L. J. Ch.* 632; 25 *L. T.* 211; 3 *W. R.* 532.

THE plaintiff being a manufacturer of Eau de Cologne, which he sold in bottles bearing special labels, the defendant, a printer, printed and sold other labels similar to those used by the plaintiff.

Suit for an injunction. The defendant undertook not to print or sell any labels in infringement of the plaintiff's rights, and to give up all labels in his possession, and the plates for printing them, and to pay £50 costs.[1]

114. Turner *v.* Evans.

July 30, 1852; June 6, 1853. *Knight Bruce and Lord Cranworth, L. JJ.* — 2 *De G., M. & G.* 740. *Queen's Bench.* — 2 *E. & B.* 512; 22 *L. J. Q. B.* 412; 17 *Jur.* 1073; 21 *L. T.* 153; 1 *W. R.* 434.

THE plaintiffs purchased from the defendant, a wine merchant in the counties of Carnarvon, Anglesea, and Merioneth, his business, stock in trade, etc., including £2,000 as a premium for the good-will, and the defendant agreed (among other things) not directly or indirectly to carry on the business of a wine merchant in those counties. He subsequently set up business outside those counties, but solicited and obtained orders within them.

On motion by the plaintiffs for an injunction to restrain the defendant from soliciting orders, *Held*, by Kindersley, V. C.

[1] See *Farina* v. *Silverlock*, 130.

(affirmed by Lord Cranworth, L. J.), that there had been no breach of the agreement, and that the injunction must be refused until after a trial at law.

Action of assumpsit. Verdict for the defendant directed, with leave to move to enter a verdict for the plaintiffs, with nominal damages.

On motion by the plaintiffs accordingly, *Held*, that there had been a breach of the agreement. Injunction subsequently granted.

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115. Rodgers *v.* Nowill. (2.)

January 17, February 22, 1853. *Stuart, V. C.* — 17 *Jur.* 109; 1 *W. R.* 122. *Knight Bruce and Turner, L. JJ.* — 3 *De G., M. & G.* 614; 22 *L. J. Ch.* 404; 17 *Jur.* 171; 20 *L. T.* 319; 1 *W. R.* 205–216.

THE defendant having been restrained from the use of a certain trade-mark on cutlery, consisting of "*J. Rodgers & Sons*," with a crown and "*V. R.*" (*Rodgers v. Nowill* (1)), afterwards entered into a partnership with his father and brother in 1848, and thenceforward used the same mark, sometimes with colorable additions.

On motion for committal for breach of the injunction in 1853, *Held*, by the V. C., that, on account of the plaintiffs' delay, the motion must be refused, but without costs; by the L. JJ., that the defendant must be committed, unless within a week he suggested and undertook to use for the future a mark which the court should approve.

Per Turner, L. J. "On the question of acquiescence, I think that in a case of this description, where there has been an injunction granted by this court, there must, in order to deprive the party who has obtained the injunction of the right to move for committal upon the breach of it, be a case made out almost amounting to such a license to the party enjoined to do the act enjoined against, as would enable him to maintain a bill against others for doing that act. The party enjoined must, I think, show such acquiescence as would be sufficient to create new right in him."

116. Flavel *v.* Harrison.

February 22, 1853. *Wood, V. C.* — 10 *Hare*, 467; 22 *L. J. Ch.* 866; 17 *Jur.* 368; 1 *W. R.* 213.

THE plaintiff being the manufacturer, in succession to his father, the original inventor, of an article which, though not patented, he called "*Flavel's Patent Kitchener*," the defendant, who had been in the plaintiff's employ, began to advertise for sale other goods under the same name.

Motion by the plaintiff for an injunction to restrain the defendant from so doing refused, liberty being given to bring an action, on the ground that, (1.) the plaintiff falsely described his article as patented; (2.) he had delayed making his motion for four months after he had known of the defendant's use of the name.

"I think that the use of the word 'patent' operates to prevent the public from testing it (the invention) as they otherwise might; they are dissuaded from examining the article with a view to imitation; and it is in evidence that persons were prevented from making that free use of it which every purchaser has a right to make of an unpatented article. The knowledge that there was no patent would enable and encourage every ironmonger who bought the article to take it to pieces, and examine, and make copies and models of all the parts, for the purpose of imitation, if he thought it likely to be useful, which he would never think of doing with regard to a patented article."[1]

117. Burgess *v.* Burgess.

March 17, 1853. *Knight Bruce and Turner, L. JJ.* — 3 *De G., M. & G.* 896; 22 *L. J. Ch.* 675; 17 *Jur.* 292; 21 *L. T.* 53.

THE plaintiff manufacturing "*Burgess' Essence of Anchovies*," at 107 Strand, the defendant, who was his son, and had been in his employ, set up a business for himself, in which he styled himself, on his shop front and labels, as "*late of* 107 *Strand*," and called the article he made "*Burgess' Essence of Anchovies.*"

[1] See *Leather Cloth Co.* v. *American Leather Cloth Co.* 223.

On motion by the plaintiff, before Kindersley, V. C., injunction granted as to "*late of* 107 *Strand*," but refused as to "*Burgess' Essence of Anchovies.*"

On appeal, *Held*, (1.) that in the absence of fraud the defendant could not be restrained from using his own name, or describing his article as being what in fact it was; (2.) that a delay from October to March in appealing from the refusal of the motion for an injunction was fatal to the appeal; (3.) and that the wider injunction must be refused.

Per Turner, L. J. "Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is false representation or not." [1]

[1] The right of a man to use his own name has been the subject of much discussion. In the United States and England it is safe to say that the rule has been settled with reasonable certainty. It is now established that a court will not hesitate to direct the manner in which a man shall use his name; he will not be prevented from using it, but he will be compelled to use it honestly; as far as he makes it an instrument in the perpetration of fraud, just so far will equity pursue and check him.

The rule was formulated by the Court of Appeals of New York in the case *Meneely* v. *Meneely*, **472**, in which it was said, that while the court would not absolutely restrain the defendant Meneely from the use of his own name, it would enjoin him from using it in such a way as to deceive the public and injure the plaintiff. The Supreme Court of Connecticut, in *Meriden Britannia Company* v. *Parker*, **409**, said: "We think the petition should be granted so far as to restrain the use of the words '*Rogers Bros.*,' but the use of the name '*Rogers*' ought not to be prohibited." There can be no doubt that the American cases are all to this effect, and that the English decisions are only different as tending to enlarge the complainant's right.

What may be accepted as the present position of the courts of both countries will be found in the opinion of Lord Justice James in *Thorley's Cattle Food Co.* v. *Massam*, **671**, decided during the year 1880, the full text of which is published in this volume. It will be remarked that the learned judge negatives many popular interpretations of familiar cases, and that his conclusions carry the question under discussion to a point which, if advanced, is only in line with the intimations of the House of Lords, as expressed in a number of recent cases.

118. Farina *v.* Gebhardt.

March 23, 1853. *Wood, V. C.* — *Cited* 3 *Eq. Rep.* 891 ; 1 *K. & J.* 517.

THE plaintiff being a manufacturer of Eau de Cologne, which he sold in bottles bearing certain special labels, the defendant imitated those labels.

Motion by the plaintiff for an injunction to restrain the defendant from infringing his rights refused, on the ground of the plaintiff's delay in making his application. The defendant subsequently submitted to pay his own costs, and undertook to refrain from future infringements.[1]

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119. Edelsten *v.* Vick.

April 16, 1853. *Wood, V. C.* — 11 *Hare*, 78 ; 1 *Eq. Rep.* 413; 18 *Jur.* 7.

THE plaintiffs being the successors in business of the original patentees of "*Tayler & Co.'s Patent Solid-headed Pins*," continued, after the expiration of the patent, to use on their packets of pins labels printed from the old blocks, describing the pins as "*patent.*"

The defendants made pins and sold them in packets made up and labelled similarly to the plaintiffs', except that they added "*J. Vick, from the late.*"

On motion by the plaintiffs for an injunction to restrain the defendants from so doing:

Held, (1.) that the plaintiffs were entitled to an injunction to restrain a palpable fraud ; (2.) that the defendants could not be absolutely restrained from representing that their pins were made according to Tayler's expired patent, but that they must not do so in such a way as to deceive ; (3.) that the plaintiffs were not disentitled by reason of their continued user of the word "patent," since there had been a patent, and the word had not been first adopted after its expiration.

"It does not follow, because upon the expiration of the patent the article and its known description become open to all, that therefore

[1] See *McLean* v. *Fleming*, 580.

all would become entitled to use the label by which the patentees had been accustomed to distinguish their goods. The public may have acquired confidence in that particular label, and that confidence may have given a value to it which the patentees may be entitled to have protected after the expiration of their patent." [1]

120. R. *v.* Dundas.

1853. *York Assizes: Erle, J.* — 6 *Cox*, 380.

On an indictment for obtaining money by false pretences, the prisoner having induced the prosecutor to buy blacking of him, contained in bottles labelled "*Everett's Premier*" (that being the name of an article manufactured by a London maker of high reputation), on a representation that the blacking was Everett's and himself Everett's agent:

Held, (1.) that an offer to sell on sale or return was immaterial, the actual bargain being for cash; (2.) that it was unimportant whether the prisoner's name were or were not Everett, as he asserted, if he had acted fraudulently; (3.) that the jury must decide whether or not certain differences between the labels on the prisoner's bottles and those on the genuine ones were mere small, colorable differences, and intended to deceive.

Guilty. — Two years' imprisonment.

121. Stokes *v.* Landgraff.

October, 1853; September, 1854. *N. Y. Sup. Ct.* — 17 *Barb.* 608; *R. Cox*, 137.

The plaintiff being a manufacturer of glass, which he sold under the names "*Galen*," "*Lake*," "*Cylinder*," "*Wayne*," "*New York*," the defendants made and sold other glass under the same names.

On motion by the defendants, injunction, which had been granted on motion by the plaintiff to restrain them from so doing, dissolved, on the ground that those words were indicative, not of the manufacturer, but of the quality of the article.

[1] See *Leather Cloth Co.* v. *American Leather Cloth Co.* 223.

Per Strong, J. "The principle is well settled that a manufacturer may, by priority of appropriation of names, letters, marks, or symbols of any kind to distinguish his manufactures, acquire a property therein as a trade-mark. . . . . In respect to words, marks, or devices, which do not denote the goods, or property, or particular place of a person, but only the nature, kind, or quality of the articles in which he deals, a different rule prevails. No property in such words, marks, or devices can be acquired."

122. Hoffman *v.* Duncan.

November 2, 1853. *Wood, V. C.* — *Seton, 4th ed.* 256.

PARTNERSHIP suit. Injunction granted, after the dissolution of the firm of "*Hoffman & Duncan*," to restrain one of the former partners from the use of the name of the partnership.

123. Shrimpton *v.* Laight.

January 19, 1854. *Romilly, M. R.* — 18 *Beav.* 164.

THE plaintiffs being the makers of a needle which they called "the graduated, grooveless, drill-eyed, ground down," and sold in packets labelled with those words, and a statement that they were "*invented and made solely by Shrimpton & Hooper, at the Albion Needle Works, Studley*," the defendant, authorized, as he alleged, by one David Shrimpton Turvey, who was not a needle-maker, began to sell other needles in packets similarly labelled, except that "*Shrimpton & Hooper*" and "*Albion Needle Works*" were omitted, and "Shrimpton Turvey" substituted.

On motion by the plaintiffs, injunction granted to restrain the defendant from imitating the plaintiffs' labels.

"The way in which the court deals with these cases is, not to see whether manufacturers themselves would distinguish them, but whether the public, who may be more easily misled, would probably be deceived."

124. Taylor *v.* Taylor.

January 19, 1854. *Wood, V. C.* — 2 *Eq. Rep.* 290; 23 *L. J. Ch.* 255; 22 *L. T.* 271.

THE plaintiffs being manufacturers of thread, which they sold on reels bearing labels, on which the words "*Taylor's Persian Thread*" were prominent, the defendant began to sell thread similarly put up, except that before the name "*Taylor*" he inserted "*Sam.*" instead of "*J. W.*"

On motion by the plaintiffs, injunction granted to restrain the defendant from selling thread on reels labelled with that name, or any other colorable imitation of the plaintiffs' labels.

"In every case the court must ascertain whether the differences are made *bonâ fide* in order to distinguish the one article from the other, whether the resemblances and the differences are such as naturally arise from the necessity of the case, or whether, on the other hand, the differences are simply colorable, and the resemblances are such as are obviously intended to deceive the purchaser of the one article into the belief of its being the manufacture of another person. Resemblance is a circumstance which is of primary importance for the court to consider, because if the court finds, as it almost invariably does find in such cases as this, that there is no reason for the resemblance, except for the purpose of misleading, it will infer that the resemblance is adopted for the purpose of misleading."

125. Lemoine *v.* Ganton.

January, 1854. *N. Y. C. P.* — 2 *E. D. Smith*, 343; *R. Cox* 142.

THE plaintiff, a French manufacturer of calf-skin leather, adopted a new trade-mark for his leather, and discontinued the use of his old mark. About a year later the defendant sold leather not prepared by the plaintiff bearing the plaintiff's discontinued mark. Action for damages. A verdict having been returned for the plaintiff, on motion for a new trial, *Held*, that the plaintiff was entitled to recover damages

for the defendant's infringement of his rights, notwithstanding that he had discontinued the use of the mark.

Per Daly, J. "The wrong and injury to the plaintiff consisted in the sale of calf-skins falsely purporting and declared to be of his manufacture; and it makes no difference whether that object was effected by counterfeiting the trade-mark which he uses at present or one that he formerly used. An injury results to him in either case."

126. Gillott *v.* Kettle.

March, 1854. *N. Y. Super. Ct.* — 3 *Duer*, 624; *R. Cox*, 148.

THE plaintiff being a penmaker, who sold his pens in boxes labelled respectively with the number "303" or "753," the former denoting the superior, the latter the inferior quality, the defendant removed the labels with "753" from the boxes of inferior pens, and substituted for them labels imitated from the labels used on the boxes of superior pens, with "303."

On motion by the plaintiff, injunction granted and upheld to restrain the defendant from so doing.

Per Bosworth, J. "The fraud complained of consists in selling an inferior article of the plaintiff's manufacture as being one of a superior quality. The fraud, to the extent that it may be successful, is twofold: The public is defrauded by being induced to buy the inferior for the superior article. The plaintiff is defrauded by an unjust destruction of confidence that his pens are put up for sale and assorted with reference to the quality indicated to dealers by the labels on the boxes which contain them."

127. Evans *v.* Hughes.

March 30, 1854. *Wood, V. C.* — 18 *Jur.* 691.

THE plaintiff being the widow and executrix of one of the partners in the firm of "*Evans and Hughes*," which was constituted under articles of which one provided that, on the decease of either partner, his personal representative was to have the power, within three months, of electing to continue his share; the defendant being the surviving partner in the firm,

before the expiration of the three months, or election, began to carry on business in his own name.

On motion by the plaintiff, injunction granted to restrain the defendant, until the expiration of the three months, or election, from carrying on the business under any other name than that under which it had been carried on in the lifetime of the deceased partner.

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128. Potter *v.* The Commissioners of Inland Revenue.

June 15, 1854. *Exchequer.* — 10 *Ex.* 147 ; 23 *L. J. Ex.* 345; 18 *Jur.* 778 ; 23 *L. T.* 269; 2 *W. R.* 561.

CASE stated by the Commissioners of Inland Revenue.

Held, that the assignment by deed of the good-will of a trade was a conveyance of property within the Stamp Act, 13 & 14 Vict. c. 97, and not of a mere possibility, and was therefore subject to *ad valorem* duty.

Per Pollock, C. B. "Very frequently the good-will of a business or profession, without any interest in land connected with it, is made the subject of sale, though there is nothing tangible in it ; it is merely the advantage of the recommendation of the vendor to his connections, and his agreeing to abstain from all competition with the vendee. Still, it is a valuable thing belonging to himself, and which he may sell to another for a pecuniary consideration."

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129. Hall *v.* Hall.

March 5, 1855. *Romilly, M. R.* — 20 *Beav.* 139.

PARTNERSHIP suits. Cross-suits having been commenced by each of the partners in a brewing business carried on under articles of partnership which provided that the surviving or continuing partner, in case of the death or retirement of the other, should have the option of taking over the share of the deceased or retiring partner in the partnership "property, credits, and effects," and it having been agreed that the partnership should be dissolved, and that the continuing partner should take over the partnership "stock in trade and effects" at a valuation :

Held, that the good-will was not to be taken into account and valued as being included in the partnership "property, credits, and effects," or "stock in trade and effects."

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130. Farina *v.* Silverlock.

June 6, 1855; July 9, 1856; June 1, 1858. *Wood, V. C.* — 1 *K. & J.* 509; 3 *Eq. Rep.* 883; 24 *L. J. Ch.* 632; 25 *L. T.* 211; 3 *W. R.* 532. *Lord Cranworth, C.* — 6 *De G., M. & G.* 214; 26 *L. J. Ch.* 11; 2 *Jur. N. S.* 1008; 27 *L. T.* 277; 4 *W. R.* 731; 52 *Leg. Obs.* 342. *Queen's Bench.* — 30 *L. T.* 242; 31 *L. T.* 99. *Wood, V. C.* (*after trial at law*). — 4 *K. & J.* 650.

THE plaintiff being a manufacturer of Eau de Cologne, which he sold in bottles bearing a special label, with his signature and other particulars, the defendant, a printer, printed and sold similar labels.

On motion by the plaintiff for an injunction to restrain the defendant from so doing, *Held*, by the V. C., that the plaintiff was entitled to an injunction to restrain the defendant from "scattering over the world the means of enabling parties to commit frauds upon the plaintiff."

Held, by the Lord Chancellor, that since the labels might be printed for a legitimate purpose, viz. to replace genuine labels on genuine goods, which had become obliterated, the injunction must be dissolved, liberty being given to bring an action.

An action having been brought, and having resulted in a verdict for the plaintiff, which was upheld by the Court of Queen's Bench, injunction restored.

Per Wood, V. C. (1 K. & J. 515). "No man has a right to sell wares with a trade-mark upon them which has been used to designate the wares of the party complaining. A man may acquire, not an absolute kind of property, but that kind of right in a trade-mark which entitles him to say, 'No one shall sell goods of his own making marked with my trade-mark,' which I have been in the habit of using in my trade, so as to make people think that they are of my manufacture.'"

Per Lord Cranworth, C. (6 De G., M. & G. 217). "This right

cannot be properly described as a copyright; it is in fact a right which can be said to exist only and can be tested only by its violation; it is the right which any person designating his wares or commodities by a particular trade-mark, as it is called, has to prevent others from selling wares which are not his, marked with that trade-mark, in order to mislead the public, and so incidentally to injure the person who is owner of the trade-mark. . . . . I apprehend that the law is perfectly clear, that any one who has adopted a particular mode of designating his particular manufacture has a right to say, not that other persons shall not sell exactly the same article, better or worse, or an article looking exactly like it, but that they shall not sell it in such a way as to steal (so to call it) his trade-mark, and make purchasers believe that it is the manufacture to which that trade-mark was originally applied."

P. 219. "I think it clear that any man would be at liberty, if it was writing instead of printing, to write, or if he was capable of printing and engraving, to print and engrave for himself, a label being a colorable imitation of, or a copy of the plaintiff's label, and to put it on Eau de Cologne, being the Eau de Cologne of the plaintiff." [1]

[1] It is not to be doubted that under certain circumstances it is open to a printer to manufacture and sell labels which embody the name or mark of a manufacturer; but where it is made to appear that the actual or constructive purpose is to enable a party or the public to violate a trade-mark, an injunction will be granted. The production by the printer of a fac-simile of a label embodying the trade-mark is fraudulent whenever the label is sold, actually or constructively, for use upon other than the goods of the owner of the trade-mark. In *Colman* v. *Crump*, 579, Judge Allen, writing for the Court of Appeals of New York, said: "It is an infraction of that right (the right to a trade-mark) to print or manufacture, or put on the market for sale and sell for use, upon articles of merchandise of the same class as those upon which it is used by the proprietor, any device or symbol which by its resemblance to the established trade-mark will be liable to deceive the public and lead to the purchase and use of that which is not the manufacture of the proprieter, believing it to be his."

The distinction would seem to be that where the facts of the case show that the printer of the labels contemplated their use upon goods not made by the owner of the mark, the court will interfere whatever the intent; but where the purpose was that they should be honestly used in such manner as to be tantamount to an application of the mark by its owner, the courts will decline to interfere.

131. Morris *v.* Moss.

July 24, 1855. *Romilly, M. R.* — 25 *L. J. Ch.* 194.

ADMINISTRATION suit. *Held*, that the good-will of a business which had been carried on by a wife before marriage, and afterwards by the husband and wife, on the death of the husband survived to the wife, and that she might dispose of it and receive the purchase money for her own benefit, even though it was carried on upon leasehold premises forming a part of the husband's estate, and of which he had disposed by his will.

132. Chappell *v.* Sheard.

August 2, 1855. *Wood, V. C.* — 2 *K. & J.* 117; 1 *Jur. N. S.* 996; 3 *W. R.* 646.

THE plaintiffs being the publishers and proprietors of a song entitled "*Minnie*," which was published with a special kind of title-page, the defendant published another song under the name of "*Minnie Dale*," with a title-page copied from the plaintiffs'.

Suit for an injunction. *Held*, (1.) that the song was known to the purchasing public by four characteristics: the names of the song, of the singer, of the composer, of the publisher; (2.) that a statement on the plaintiffs' title-page "*written by George Linley*," he having written the words, though not composed the music, did not disentitle the plaintiffs, though Linley was better known as a composer than as a poet; (3.) that the plaintiffs were not disentitled by their own delay, they having first become acquainted with the piracy on June 18; (4.) and that the injunction must be granted.[1]

[1] See *Hogg* v. *Kirby*, 10.

133. Heath *v.* Wright.

October, 1855. *U. S. C. C. E. Dt. of Penn: Kane, J.* — 3 *Wall. Jr.*; *R. Cox*, 154.

THE plaintiff preparing and selling a toilet compound under the name of "*Kathairon*," the defendant sold another preparation under the same name.

Motion by the plaintiff for an injunction to restrain the defendant from so doing refused on the ground that the misstatements and exaggerations contained in the labels on the plaintiff's own bottle were such as to disentitle him to any relief.[1]

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134. The Merrimack Manufacturing Co. *v.* Garner.

November, 1855. *N. Y. C. P.* — 2 *Abb. Pr.* 318; 4 *E. D. Smith*, 387; *R. Cox*, 155.

THE plaintiffs being manufacturers of cotton prints, which they sold labelled with the words "*Merrimack Prints, Fast Colors, Lowell, Mass.*," the defendants sold other cotton goods labelled with the words "*English Free Trade, Merrimack Style, Warranted Fast Colors.*"

Suit for an injunction. Injunction which had been granted, on motion by the plaintiffs, to restrain the defendants from so doing, dissolved, on the ground that the infringement was not sufficiently clear for an injunction to be granted without a preliminary trial at law.[2]

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135. Aubin *v.* Holt.

November 23, 1855. *Wood, V. C.* — 2 *K. & J.* 66; 25 *L. J. Ch.* 36; 4 *W. R.* 112.

THE plaintiff and defendant, being the members of the firm of "*Holt & Aubin*," solicitors, having agreed, upon the dissolution of the partnership, that the defendant should con-

[1] See *Pidding* v. *How*, 60.

[2] See *Amoskeag Man. Co.* v. *Spear*, 100.

tinue to carry on the business in the old name after the dissolution, he paying a certain annuity to the plaintiff, the retiring partner, the defendant failed to pay the annuity in accordance with the terms of the agreement.

Suit for specific performance of the agreement. *Held*, that the agreement was not void as being against public policy, and that specific performance must be granted.

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136. Chappell *v.* Davidson.

November 26, 1855; January 11, 1856. *Wood, V. C.* — 2 *K. & J.* 123; *Knight Bruce and Turner, L. JJ.* — 8 *De G., M. & G.* 1.

THE plaintiffs, being the publishers and proprietors of a song called "*Minnie*," the defendant published another song under the name of "*Minnie, dear Minnie*," with a title-page copied from that of the plaintiffs' song.

On motion by the plaintiffs to continue an injunction which had been granted to restrain the defendant from so doing: *Held*, by the V. C., (1.) that the plaintiffs were entitled to an injunction without a preliminary trial at law; (2.) that the plaintiffs were not disentitled by reason of having placed on their title-page the words "written by George Linley," he being a well-known composer, — the fact being that he had written the words, but not composed the music; (3.) that the defendant could not escape his liability by instructing his shopmen to inform customers of the facts, since their statements would not pass on to subsequent purchasers; (4.) that the defendant, having insisted on his right of publication, and refused to submit, must pay costs.

Held, by the L. JJ., that the injunction ought to be continued only on the terms of the plaintiffs' undertaking to bring an action, and to be answerable in damages.[1]

[1] See *Hogg* v. *Kirby*, 10.

137. Christy *v.* Murphy.

February, 1856. *N. Y. Sup. Ct.: Clerke, J.* — 12 *How. Pr.* 77; *R. Cox*, 164.

THE plaintiff being the original founder of the "*Christy's Minstrels*," during a temporary discontinuance of his performances the defendants, most of whom had been in his service, began to perform under that name.

On motion by the plaintiff, injunction granted to restrain the defendants from so doing, notwithstanding that the plaintiff's performances were for the time being in abeyance; and *Held*, that even if the defendants could have proved a license from the plaintiff to use the name, unless they could also prove it to be irrevocable, they would have had no right to continue the use of the name one moment after the plaintiff had signified his intention to withdraw the permission.[1]

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138. Walton *v.* Crowley.

March, 1856. *U. S. C. C. S. Dt. of N. Y.: Betts, J.* — 3 *Bl. C. C.* 440; *R. Cox*, 166.

THE plaintiff being the sole vendor in America, under an exclusive contract with an English firm, of the needles made by that firm, the defendant sold other needles with trade-marks similar to those on the plaintiff's needles.

On motion by the plaintiff, injunction granted to restrain the infringement of the trade-marks on the needles made in England and sold by him.

"The plaintiff was not the inventor of this label or trade-mark, nor the one who originally adopted it, but he is the assignee of it, and of the good-will of the trade. He stands, thus, in the same relation to the defendant as his assignor would."

"A tradesman, to bring his privilege of using a particular mark under the protection of equity, is not bound to prove that it has been copied in every particular by another. It is enough for him to show that the representations employed bear such a resemblance to his as

[1] See *Booth* v. *Jarrett*, 524.

to be calculated to mislead the public generally who are purchasers of the article, and to make it pass with them for the one sold by him. If the *indicia* or signs used tend to that result, the party aggrieved will be allowed an injunction staying the aggression until the merits of the case can be ascertained and determined."

139. Wedderburn *v.* Wedderburn.

April 7, 1856. *Romilly, M. R.* — 22 *Beav.* 84; 25 *L. J. Ch.* 710; 2 *Jur. N. S.* 674; 28 *L. T.* 4.

PARTNERSHIP suit.

Held, that the plaintiffs, being the representatives of a deceased partner in a partnership business, carried on under articles which provided that the good-will of the business should, on the death of one partner, belong to the survivors, were not entitled to share in profits attributable to the good-will; though, in the absence of express agreement, good-will was partnership assets.

22 Beav. p. 104. "Good-will manifestly forms a portion of the subject matter which produces profits, which constitutes partnership property, and which is to be divided between the surviving partners and the estate of the deceased partner, according to the terms of the contract, and when that is silent, according to their shares in the concern. There is considerable difficulty in defining accurately what is included under this term good-will. It seems to be that species of connection in trade which induces customers to deal with a particular firm. . . . . I am of opinion that, both on principle, on the authority of the decided cases, and on the ordinary rules of common sense, I must, whenever there is a reputation and connection in business constituting good-will, treat that as part of the assets of the concern."

140. Lawson *v.* The Bank of London.

April 22, 1856. *Common Pleas.* — 18 *C. B.* 84; 25 *L. J. C. P.* 188; 2 *Jur. N. S.* 716; 27 *L. T.* 134; 4 *W. R.* 481.

THE plaintiff having established a bank in London called "*The Bank of London*," the defendant bank commenced business under the same name.

Action on the case. On demurrer, *Held*, that it was a fatal objection that there was no averment in the declaration that the plaintiff had ever carried on the business of a banker at his bank, since, from that omission, it disclosed no cause of action, and that the demurrer must be allowed.

Per Willes, J., p. 94. "In any way of reading this declaration, one cannot glean from it that the plaintiff had ever carried on the business of a banker. If that had been averred in the declaration, and it had been shown that the defendants carried on their business under the same name, for the purpose of making it to be believed that it was the plaintiff's business, then the question whether a corporation could as such be liable for such a fraud would have arisen. I am not prepared to say that they would not be liable if the cause of complaint were properly alleged. They would have capacity to do the act, and might possibly be responsible for its consequences."

P. 93. "No action could, I apprehend, be maintained for the sale of goods branded or stamped with another manufacturer's mark, which mark had never been put forth to the world by the party complaining of the misuser of it."

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141. Prowett *v.* Mortimer.

May 3, 1856. *Stuart, V. C.* — 2 *Jur. N. S.* 414 ; 27 *L. T.* 132 ; 4 *W. R.* 519.

THE plaintiff having become by purchase the proprietor of *The Britannia* newspaper, incorporated it with another paper called *The John Bull*, and issued the combined paper as *The John Bull and Britannia*, and the defendant, being the former printer and publisher of *The Britannia*, began to publish a new paper under the name of *The True Britannia*, as an imitation and continuation of *The Britannia*.

On motion by the plaintiff for an injunction to restrain the defendant from so doing:

Held, that the plaintiff, in the circumstances of the case, was not disentitled by the fact that he was not registered at the Stamp Office as the proprietor of either newspaper, and that an injunction must be granted to restrain the defendant from

publishing his paper, or any other paper, as a continuation of the plaintiff's paper, and from soliciting custom as for the plaintiff's paper.[1]

142. Stewart *v.* Smithson.

May, 1856. *N. Y. C. P.* — 1 *Hilt.* 119; *R. Cox*, 175.

THE plaintiffs being manufacturers of thread, which they sold under a trade-mark consisting of the words "*Hall & Moody's patent thread, Barnsley*," and "*Grant & Wilson's celebrated patent thread, Berwick*," the defendants sold other thread similarly marked.

Action for an injunction and an account. Motion by the defendants for leave to amend their answer refused, on the ground that the intended amendments, to the effect that the plaintiffs' thread had never been manufactured by any such persons as those by whom it purported to have been manufactured, and that no patent for the thread had ever existed, if true, would constitute no defence to the action.

143. Samuel *v.* Berger.

December, 1856. *N. Y. Sup. Ct.: Davies, J.* — 24 *Barb.* 163; 13 *How. Pr.* 342; 4 *Abb. Pr.* 88; *R. Cox*, 178.

THE plaintiff being a watchmaker who had purchased from another watchmaker, named Brindle, the exclusive right to stamp on his own watches the name of the latter, which had acquired a reputation, the defendants sold other watches made by Brindle, before the sale to the plaintiff, and stamped with his name.

Motion by the plaintiff for an injunction to restrain the defendant from so doing refused, with costs, since to have granted it would have been to protect the sale of the spurious article, and restrain that of the genuine.

[1] See *Hogg* v. *Kirby*, 10.

144. Fetridge *v.* Wells.

January, 1857. *N. Y. Super. Ct.: Duer, J.*—4 *Abb. Pr.* 144; 13 *How. Pr.* 385; *R. Cox*, 188.

THE plaintiff being the proprietor of a cosmetic called "*The Balm of Thousand Flowers*," the defendants began to prepare and sell a similar article, under the name of "*The Balm of Ten Thousand Flowers.*"

Injunction which had been granted, on motion by the plaintiff, to restrain the defendants from so doing, dissolved, on the ground, that (1.) the name did not constitute a trade-mark; and (2.) the plaintiff was disentitled by his own misrepresentations in the following particulars, namely: *First*, though the compound was not derived from flowers, the name was as above, and the directions for use contained direct statements to that effect; *second*, the plaintiff in his advertisements falsely overstated the amount paid by him for the secret recipe; and, *thirdly*, the directions contained the most exaggerated statements with respect to the valuable qualities of the cosmetic.

The defendants being *in pari delicto*, no costs given.[1]

145. Fetridge *v.* Merchant.

January, 1857. *N. Y. Super. Ct.: Hoffman, J.*—4 *Abb. Pr.* 156; *R. Cox*, 194.

THE plaintiff being the proprietor of a cosmetic called "*Balm of Thousand Flowers*," the defendants sold another preparation under a similar name.

On motion by the defendants to dissolve an injunction which had been granted to restrain them from so doing:

Held, (1.) that the name was a fancy name, and not descriptive; (2.) but that the injunction must be dissolved, the plaintiff to bring an action, on the ground of the uncertainty of the plaintiff's having been the first to appropriate the name.[2]

[1] See *Pidding* v. *How*, 60.

[2] See *preceding case.*

"The further removed such an appellation (*i. e.* a fancy name) is from actually representing the article in question, the more exclusive and decided becomes the right to it."

"Even if the term used may be used in common, yet it may be employed by one with such peculiar emblems, colors, and devices, as to give to him an exclusive right. Strictly, the right of appropriation in such instances results from the peculiar emblems."

146. Bloss *v.* Bloomer.

March, 1857. *N. Y. Sup. Ct.* — 23 *Barb.* 604; *R. Cox*, 200.

THE defendant purchased from the plaintiffs a number of seed bags, marked with the plaintiffs' label, and agreed to fill them with seeds of good quality, but filled them with inferior seeds.

Action for damages. On demurrer, *Held*, that the plaintiffs were not entitled to recover damages from the defendant for injury caused to their reputation by his so doing, since the contract was for a fraud upon the public, and that the demurrer must be allowed.

Per E. D. Smith, J. "If it be a crime to counterfeit labels, words, or devices previously appropriated to distinguish property, or to vend goods thus stamped, without disclosing the fact to the purchaser, it is equally an offence against the spirit of the law, equally injurious to trade and commerce, and equally an imposition upon the public, to palm off spurious goods under cover of genuine labels and devices. Contracts to do this are clearly against public policy, and should not be upheld and enforced by the courts."

147. R. *v.* Bryan.

May 11, 1857. *C. C. R.* — *D. & B.* 265; 7 *Cox*, 312; 26 *L. J. M. C.* 84; 3 *Jur. N. S.* 620; 45 *C. C. C. Sess. Pap.* 529.

ON an indictment for obtaining money by false pretences, the prisoner having been found by the jury to have obtained advances of money from pawnbrokers on certain plated spoons, by means of fraudulent representations that the spoons had as

much silver on them as Elkington's A, and that the foundations were of the best material, knowing that to be untrue :

Held, that the statement made by the prisoner merely amounted to an exaggerated commendation in the course of bargaining, with respect to a matter of opinion, and not to a deliberate misstatement of a matter of fact, and that the conviction must be quashed.

148. Clark *v.* Clark.

May, 1857. *N. Y. Sup. Ct.* — 25 *Barb.* 76; *R. Cox*, 206.

THE plaintiffs being manufacturers of thread, which they sold in spools labelled with their name and other particulars, the defendant sold other thread labelled in a very similar manner.

Suit for an injunction. Injunction, which had been granted on motion by the plaintiffs, to restrain the defendant from imitating the plaintiff's trade-marks on spool cotton, and which had afterwards been dissolved, restored in part, so as to restrain the use by the defendant of his own name (which was the same as the plaintiffs') only when so placed as to produce deception, and not absolutely.[1]

Per Mitchell, J. "If the wholesale buyer, who is most conversant with the marks, is not misled, but the small retailer or the consumer is, the injury is the same in law, and differs only in degree. The right of action must exist for the last as well as for the first."

149. Peterson *v.* Humphrey.

May, 1857. *N. Y. Sup. Ct.: Mitchell, J.* — 4 *Abb. Pr.* 394; *R. Cox*, 212.

AFTER the dissolution of the firm of "*Peterson & Humphrey*" each partner commenced a new business, and one, the defendant, trading under the name of "*Humphrey & Co.*" at the old premises, continued to use the old sign with the old name on the premises, without sufficient alterations to show the change in the firm.

[1] See *Burgess* v. *Burgess*, 117.

Injunction granted to restrain the defendant from so doing, and also to restrain him from publishing any notice to the effect that he was carrying on the business of the old firm; but the defendant to be at liberty to state that he had been a member of the old firm, and was carrying on the same kind of business as formerly.

150. Williams *v.* Johnson.

1857. *S. C. N. Y. General Term.* — 2 *Bos.* 1.

PLAINTIFFS were manufacturers of soap, which they sold under the name of "*Genuine Yankee Soap*," using a particular style of wrapper, form of cake, hand-bill, etc.; defendant put up his soap in a similar manner with slight variations. It appeared that there was sufficient doubt about the exclusive right of the plaintiffs to use the words "*Genuine Yankee*" to prevent their being protected, but an injunction was granted restraining the defendant from using the simulated wrapper, etc., complained of.

Per Woodruff, J. "They (plaintiffs) have adopted (in reference to their manufacture of an article which any and every one may manufacture and sell if he pleases) a *form and size of cake*, a *particular mode of covering and packing*, a *combination of three labels on each cake*, *an exterior hand-bill upon the box*, and have so arranged the whole as to suggest to any one desiring to purchase their soap upon an inspection, that the article is theirs and made by them. All this the defendant has copied with an exactness which is calculated to deceive even the wary, much more to entrap those who are not in the exercise of a rigid scrutiny." After citing a number of cases, it is said: "We have no hesitation in saying that his (defendant's) acts are a clear infringement of the plaintiffs' rights. He has copied *the form*, *appearance*, *color*, *style*, *and substantial characteristics*, in all respects, which distinguish the plaintiffs' goods." [1]

[1] This case is generally regarded as a leading decision going to sustain the doctrine of the later cases, that, as said by Judge Clifford in *McLean* v. *Fleming*, 580, "it is not necessary, in order to give a right to an injunction, that a specific trade-mark should be infringed, but it is sufficient that the court is satisfied there was an intent on the part of respondent to palm off his goods as the goods of the complainant." The opinion has been frequently cited as main-

151. The Collins Company *v.* Brown.

June 10, 1857. *Wood, V. C.* — 3 *K. & J.* 423; 3 *Jur. N. S.* 929; 30 *L. T.* 62.

THE plaintiffs being an American company of edge-tool manufacturers, who stamped their goods "*Collins & Co., Hart-*

taining in effect that where the appearance of a peculiar and original package has acquired through use an understood reference to the goods of a manufacturer, and a competing manufacturer knowingly imitates the peculiar characteristics of the package, with intent to deceive the public, such imitation will be held to be an infringement of the rights of the person first using the package.

An indirect recognition of this now probably well-settled doctrine may, perhaps, be based upon *Edelsten* v. *Vick*, **119**, and other English cases, but it can hardly be said to have found distinct expression prior to the case of *Frese* v. *Bachof*, **603**, decided by Judge Wheeler, holding the United States Circuit Court for the Southern District of New York. It there appeared that there was a simulation of a package having peculiar characteristics, which characteristics the court protected by injunction. The learned judge said: "Probably no mere form of a package would ever alone amount to a representation, capable of deceiving, that the wares contained in it were those of any particular make; but when the form of these packages, the color of the wrappers and papers done up with them, and the form and color of the labels, are considered all together, it is quite apparent that when they had been so long used by the orator's firm for holding this particular compound when offered for sale, that the mere appearance of the packages would amount to a representation that they contained that article of manufacture. It is equally obvious that the very slight changes made by the defendant in the general appearance of his packages . . . . would not put the general public purchasing such articles on their guard, and that the use of such packages for a similar article would amount to a forcible representation that it was the same article the orator's firm had been accustomed to pack in that way." The court accordingly directed that an injunction should be granted upon certain amendments being made.

In the case of *Enoch Morgan's Sons Co.* v. *Schwackhoffer*, **665**, decided in the Supreme Court of New York, Judge Lawrence said: "I am, therefore, of the opinion that the plaintiffs are entitled to an injunction, restraining the defendant from vending 'Saphia,' in the blue packages in which it is now sold. By this I do not mean to be understood as holding that the defendant has not the right to manufacture and also sell 'Saphia,' nor to restrain him from the use of that name, or of the figure or device upon the label. But I do intend that he shall abstain from dressing his goods in wrappers so closely resembling the plaintiff's as to enable him to deceive the public and perpetrate a fraud. That he shall not sell 'Saphia' as and for 'Sapolio.' In other words, he must sell under his own colors and not under those of the plaintiff."

In an action by the plaintiff in the case just referred to, tried before Hon. Joseph S. Bosworth, an ex-judge of the Superior Court of New York, as referee, the principle was applied in a very advanced case. The learned referee formulated the rule as follows: "There was an intent on the part of the de-

ford Cast Steel, Warranted," the defendant, an English maker, made other goods with the same stamp.

Suit for an injunction and account. Demurrer by the defendant, on the ground of the plaintiffs' alienage, overruled.

"If a man has been in the habit of using a particular mark for his goods for a long time, during which no one else has used a similar mark, and then another person begins to use the same mark, that can only be with a fraudulent intent; and any fraud may be redressed in the country in which it is committed, whatever may be the country of the person who has been defrauded."

152. The Collins Company *v.* Cowen.

June 11, 1857. *Wood, V. C.* — 3 *K. & J.* 428; 3 *Jur. N. S.* 929; 29 *L. T.* 245; 30 *L. T.* 62; 5 *W. R.* 676.

THE plaintiffs being an American company of edge-tool manufacturers, who stamped their goods "*Collins & Co., Hart-*

fendants to mislead the public; the public has been misled, and the plaintiffs have been subjected to loss and damage thereby. Fraud and damage are thus coupled together as cause and effect."

Upon the same state of facts the law, as laid down by ex-judge Bosworth, was recognized in *Enoch Morgan's Sons Co.* v. *Hunkele*, in the United States Circuit Court for the District of New Jersey.

In *Sawyer* v. *Horn*, decided by the United States Circuit Court for the District of Maryland, after a careful examination of the authorities the court say: —

"We have come to the conclusion in the case before us, that the respondent should be enjoined from putting up his goods in the manner in which he has been doing as shown by the exhibit, or in any other manner so simulating the form, color, labels, and appearance given by the complainant to his goods as to mislead purchasers into mistaking one for the other.

"What we decide is, that whether the complainant has a trade-mark or not, as he was the first to put up blueing for sale in the peculiarly shaped and labelled boxes adopted by him, and as his goods have become known to purchasers and are bought as the goods of the complainant by reason of their peculiar shape, color, and label, no person has the right to use the complainant's form of package, color, or label, or any imitation thereof, in such manner as to mislead purchasers into buying his goods for those of the complainant, whether they be better or worse in quality."

There are numerous cases which make in favor of the rule as laid down in the foregoing in which the precise question under discussion did not arise. If there are a few isolated instances which look in a different direction, a careful examination will show that they are not decisive of more than the uncontroverted proposition that the form and appearance of a package never constitute a *technical trade-mark*.

See *Lee* v. *Haley*, 325.

ford Cast Steel, Warranted," the defendants, English makers, made other goods with the same stamp.

Demurrer by the defendants, on the ground of the plaintiffs' alienage, overruled.

"The question has nothing to do with the question of copyright.

"I apprehend that every subject of every country, not being an alien enemy, — and even to an alien enemy the court has extended relief in cases of fraud, — has a right to apply to this court to have a fraudulent injury to his property arrested. And here the plaintiffs have the right — a right recognized, I imagine, everywhere in the world, or at least in every civilized community — of saying, 'We, being the manufacturers of certain goods, claim that another man shall not manufacture goods, and put upon them our trade-mark, and then pass them off as manufactured by us.'"

153. Darbey *v.* Whitaker.

July 13, 1857. *Kindersley, V. C.* — 4 *Drew.* 134; 5 *W. R.* 772.

SPECIFIC performance of a written agreement for the sale of a leasehold public-house, good-will, etc., refused, the agreement containing a clause as to arbitration which the court could not enforce; although, but for that clause, specific performance would have been granted.

"It is said there can be no specific performance of a contract to purchase a good-will. No doubt you cannot have a specific performance of a contract to purchase a good-will alone, unconnected with business premises, by reason of the uncertainty of the subject matter. But when a good-will is entirely or mainly annexed to the premises, and the contract is for the sale of the premises and good-will, there is not the slightest ground for doubt that such a contract is a fit matter for a decree in a suit for specific performance."

154. Brooklyn White-Lead Co. *v.* Masury.

September, 1857. *N. Y. Sup. Ct.* — 25 *Barb.* 416; *R. Cox*, 210.

THE plaintiffs and defendant alike manufactured white-lead in Brooklyn, and had a shop in New York. The plaintiffs

labelled their kegs "*Brooklyn White-Lead Co.*," the defendant at first labelled his "*Brooklyn White-Lead Pure*, 100 *lbs.*," but afterwards changed this to "*Brooklyn White-Lead and Zinc Company.*"

Injunction granted to restrain the defendant from the use of the word "*Company*" or "*Co.*" as being an unlawful imitation of plaintiffs' corporate name.

Per Mitchell, J. "It is to protect the plaintiffs' right of selling their own that the law of trade-marks has been introduced. It must include a right to sell to all, to the incautious as well as to the cautious. Any false name that is assumed in imitation of a prior true name is in violation of this right, and the use of it should be restrained by injunction." [1]

155. R. *v.* Closs.

November 30, 1857. *C. C. R.* — *D. & B.* 460; 7 *Cox*, 494; 27 *L. J. M. C.* 54; 3 *Jur. N. S.* 309.

On an indictment for obtaining money by false pretences, for a cheat at common law and for forgery, the prisoner having sold a copy of a painting as the original, with the signature of the painter, J. Linnell, imitated in the corner, and the jury having acquitted the prisoner on the first count, but found him guilty on the others:

Held, (1.) that as to the count for forgery, the conviction was bad, there being no forgery of a written document; (2.) that as to the count for a cheat at common law, the conviction would have been good if the count had shown that it was by the false token that the money had been obtained, but that, this not being so, the conviction on this count was bad; (3.) and, therefore, that the conviction must be quashed.

Per Cockburn, C. J. "A forgery must be of some document or writing; and this was merely in the nature of a mark put upon the painting with a view of identifying it, and was no more than if the painter put any other arbitrary mark as a recognition of the painting being his. . . . . If a person in the course of his trade, openly and

[1] See *Newman* v. *Alvord*, 282.

publicly carried on, were to put a false mark or token upon an article, so as to pass it off for a genuine one, when in fact it was only a spurious one, and the article was sold and money obtained by means of that false mark or token, that would be a cheat at common law."

156. Austen *v.* Boys.

December 7, 1857; June 23, 1858. *Romilly, M. R.* — 24 *Beav.* 598; 27 *L. J. Ch.* 243; 3 *Jur. N. S.* 1285; 30 *L. T.* 216. *Lord Chelmsford, C.* — 2 *De G. & J.* 626; 27 *L. J. Ch.* 714; 4 *Jur. N. S.* 719; 31 *L. T.* 276; 6 *W. R.* 729.

PARTNERSHIP suit. The parties, solicitors, having agreed, by their articles of partnership, to become partners for seven years, and the articles providing that, if either retired, he should receive the value of his good-will:

Held, that on the retirement of one of the partners, by notice given two days before the end of the seven years, he was only entitled to receive the value of the good-will as for those two days, and not as of a going concern.

Per Lord Chelmsford, C. "It is very difficult to give any intelligible meaning to the term 'good-will' as applied to the professional practice of a solicitor in this abstract sense. Where a trade is established in a particular place, the good-will of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. It was truly said in argument that 'good-will' is something distinct from the profits of a business, although in determining its value the profits are necessarily taken into account; and it is usually estimated at so many years' purchase upon the amount of these profits. But the term 'good-will' seems wholly inapplicable to the business of a solicitor, which has no local existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity and ability to conduct their legal affairs."

157. Welch *v.* Knott.

December 22, 1857. *Wood, V. C.* — 4 *K. & J.* 747; 4 *Jur. N. S.* 330.

THE plaintiffs being manufacturers of soda-water, which they sold in bottles in which were moulded the words "*J. Schweppe & Co.*, 51 *Berners Street, Oxford Street, Genuine Superior Aerated Waters*," and which had a label of colored paper over the cork, with the words "*J. Schweppe & Co.*," the defendant sold other soda-water in old bottles of the plaintiffs', moulded with their name, and with somewhat similar labels over the cork, but printed with the words "*Soda Water*," instead of the plaintiffs' name.

On motion to dissolve an injunction which had been granted, on motion by the plaintiffs, to restrain the defendant from infringing the plaintiffs' rights:

Held, that the injunction must be dissolved, on the ground that the bottles were not shown to have been sold, when refilled, with any intention to deceive, or probability of deception, although if a probability of deception had been caused, though unintentionally, by the defendant, the injunction would have been continued.

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158. Davies *v.* Hodgson.

February 15, 1858. *Romilly, M. R.* — 25 *Beav.* 177; 27 *L. J. Ch.* 449; 4 *Jur. N. S.* 252; 31 *L. T.* 49; 6 *W. R.* 355.

ADMINISTRATION suit. *Held*, that since a surviving partner or clerk, who is appointed executor, remains at liberty to continue to carry on the same trade, a purchaser of the good-will of a testator's business must take it subject to the chance of retaining the old customers, and that, in the case in question, the good-will was valueless, since the brother of the testator, who had been actively concerned in the business, could not be prevented from continuing to carry it on.

159. Ex parte Foss; In re Baldwin.

February 16, March 23, 1858. *Evans, Comm.* — 30 *L. T.* 354. *Knight Bruce and Turner, L. JJ.* — 2 *De G. & J.* 230; 27 *L. J. Bank'cy*, 17; 4 *Jur. N. S.* 522; 31 *L. T.* 30.

THE registered proprietor of the *Standard* and *St. James' Chronicle* newspapers became bankrupt while the sheriff was in possession of his premises.

Held, that the right of publication of the newspapers was property, and therefore "goods and chattels" within the enactments in the bankruptcy acts as to reputed ownership; but that it was intangible property, and, therefore, incapable of seizure by a sheriff, and, therefore, that though the sheriff was in possession of the premises at the time of the bankruptcy, the right of publication passed to the assignees in bankruptcy.

160. Lazenby *v.* Lazenby.

March 17, 1858. *Romilly, M. R.* — *Seton, 4th ed.* 237; *cited* 41 *L. J. Ch.* 354.

INJUNCTION granted to restrain the defendant from using upon sauces not of the plaintiff's manufacture, labels or trade-marks similar to those placed by the plaintiff upon his "*Harvey's Sauce.*"

161. R. *v.* Smith.

April 24, 1858. *C. C. R.* — *D. & B.* 566; 8 *Cox*, 32; 27 *L. J. M. C.* 225; 4 *Jur. N. S.* 1003; 31 *L. T.* 135; 6 *W. R.* 495; 47 *C. C. C. Sess. Pap.* 269; 48 *Ib.* 8.

ON an indictment for forgery, the prisoner having had printed a large number of wrappers in imitation of those used on Borwick's baking powders and egg powders, having the name of Borwick in a prominent position, but with his signature, and the notice that without that no powder was genuine, omitted, and the prisoner having sold a quantity of spurious powder in these wrappers:

Held, that, although the prisoner might have been convicted of obtaining money by false pretences, the offence was not that of forgery, and that the conviction must be quashed. The prisoner subsequently pleaded guilty to an indictment for obtaining money by false pretences.

Per Pollock, C. B. "The issuing of this wrapper without the stuff within it would be no offence. In the printing of these wrappers there is no forgery; the real offence is the issuing them with fraudulent matter in them."

Per Bramwell, B. "Forgery supposes the possibility of a genuine document, and that the false document is not as good as the genuine document, and that the one is not as efficacious for all purposes as the other. In the present case one of these documents is as good as the other: the one asserts what the other does; the one is as true as the other, but the one is improperly used."

162. Marshall *v.* Watson.

April 28, 1858. *Romilly, M. R.* — 25 *Beav.* 501.

THE plaintiff being one of two joint proprietors of two newspapers, called *The Northern Daily Express* and *The Northern Weekly Standard*, and having agreed to sell his interest to his partner, the defendant, the latter, while the contract for purchase was still incomplete, and a suit by the plaintiff for specific performance of the contract was pending, published statements as to the profits and loss of the papers, with a view to the formation of a company to carry them on.

Motion by the plaintiff, for an injunction to restrain the defendant from publishing such statements, on the ground that they were injurious to the interests of the newspapers and himself, refused.

163. Ansell *v.* Gaubert.

June 5, 1858. *Wood, V. C.* — *Seton, 4th ed.* 235.

INJUNCTION granted to restrain the defendant from using the names belonging to the plaintiff's preparations for the hair, and using labels imitated from the plaintiff's, and mak-

ing preparations after the plaintiff's secret recipes, and publishing advertisements and circulars representing that the defendant was carrying on the plaintiff's business and manufacturing the plaintiff's goods.

164. The Collins Company *v.* Reeves.

June 29, 1858. *Stuart, V. C.* — 28 *L. J. Ch.* 56; 4 *Jur. N. S.* 865; 33 *L. T.* 101; 6 *W. R.* 717.

THE plaintiffs being American manufacturers of edge-tools, which they stamped with the words, "*Collins & Co., Hartford Cast Steel, Warranted*," the defendant marked goods of his own make in the same manner, in obedience to an order from English merchants.

An interim injunction having been granted, motion by the plaintiffs for decree for a perpetual injunction refused, the defendant alleging a trade custom for makers' marks to be placed by their orders upon goods made for them, and that the plaintiffs had themselves ordered this to be done in other cases, which was not contradicted by the plaintiffs. But injunction continued for a year, the plaintiffs being required to bring an action at law within that time.

"The plaintiffs, if they have an exclusive right to the use of the trade-marks in question, are entitled to the protection of this court in the enjoyment of such use. Though they are aliens, they are entitled to sue in this court against any fraudulent invasion of their right, and that notwithstanding that the tools stamped with the marks, the fraudulent use of which is complained of, are not usually sold by them in this country."

165. Macdonald *v.* Richardson.

July 26, 1858. *Stuart, V. C.* — 1 *Giff.* 81; 5 *Jur. N. S.* 9; 32 *L. T.* 237.

PARTNERSHIP suit. The plaintiffs, being the residuary legatees of one of two partners in the business of a commission agent, sought to make the surviving partner, who was also an executor of the deceased partner, account for the estate of the latter.

Held (among other things), that the value of the testator's share of the good-will of the partnership business at his death should be ascertained, and that the executor should make good to the testator's estate what should be found to be due to it for such share of good-will and interest.

166. Fenn *v.* Bolles.

September, 1858. *N. Y. Super. Ct.: Hoffman, J.* — 7 *Abb. Pr.* 202.

THE defendant, being the surviving partner in the firm of "*Hobart Fenn & Co.*," continued after the death of his partner to trade in the old name.

On motion by the administratrix of the estate of the deceased partner, injunction granted to restrain the defendant from using the name "*Hobart Fenn*," or "*Hobart Fenn & Co.*," on the ground that either the partnership name died with the partnership, or, if it survived, was the common property of the surviving partner and the estate of the deceased one.

167. Myers *v.* Baker.

November 22, 1858. *Exchequer.* — 3 *H. & N.* 802; 28 *L. J. Ex.* 90; 32 *L. T.* 133; 7 *W. R.* 66.

ACTION brought under 5 & 6 Will. IV. c. 83, s. 7, to recover a penalty for marking patent penholders with the mark "*K. & G., Patent Elastic*," without the license of the patentee.

Held, that it was no defence to say that the invention was not new, and the patent therefore bad; but that a fraudulent intention on the part of the defendants must be proved.

Cockburn, C. J., told the jury at the trial that "the intention of the defendants was of the essence of the offence; that the plaintiffs were bound to show that the defendants had put the marks upon the articles in question with the intention of imitating the marks used by the plaintiffs on their patented articles; that unless they thought that the marks on the pens and penholders manufactured by the defend-

ants were substantially the same as, and intended to counterfeit, the plaintiffs' marks, they should find for the defendants."

168. Cooper *v.* Hood.

December 3, 1858. *Romilly, M. R.* — 26 *Beav.* 293; 28 *L. J. Ch.* 212; 4 *Jur. N. S.* 1266; 32 *L. T.* 171; 7 *W. R.* 83.

SUIT for the specific performance of a contract for the purchase of a share in a business. *Held*, that specific performance would not be refused on account of one of the items to be purchased being described in the contract only as "good-will, etc.," those words having a sufficiently definite meaning; but specific performance refused on other grounds.

"The words are 'good-will, etc.' Now these words are connected together, and unite such other things as are necessarily connected with and belong to the good-will, many of which are easily pointed out; for instance, the use of trade-marks, and a covenant by the vendor not to carry on a similar business in Great Britain for a reasonable time, to be limited in the conveyance, having regard to the nature of such undertakings. All these would be included in the words *et cætera*, and would be included in the conveyance."

169. Burgess *v.* Hately.

December 14, 1858. *Romilly, M. R.* — 26 *Beav.* 249.

THE plaintiffs being manufacturers of "*Essence of Anchovies*," the defendant sold another sauce in bottles labelled in imitation of the plaintiffs'.

Suit for an injunction. On motion by the plaintiffs for decree, the defendant stating that no application had been previously made to him, and that he had acted in ignorance of the plaintiffs' rights, and would have submitted if previous application had been made to him, but he having made no offer to pay the costs, *Held*, that an injunction must be granted, and that the defendant must pay the whole costs, since he was the aggressor, by invading the plaintiffs' rights.

170. Burgess *v.* Hills.

December 7, 1858. *Romilly, M. R.* — 26 *Beav.* 244; 28 *L. J. Ch.* 356; 5 *Jur. N. S.* 233; 32 *L. T.* 328; 7 *W. R.* 158.

THE defendant sold a sauce similar to the plaintiffs' "Essence of Anchovies," under the name of "*John Burgess & Sons' Original and Superior Essence of Anchovies.*"

Suit for an injunction and account. On motion for decree, the defendant having offered to submit to an injunction, but declined to pay costs, *Held*, that the defendant must pay the whole costs of the suit, though he had acted in ignorance of the plaintiffs' rights.

"If the defendant had offered the plaintiffs all they were entitled to, and after that the plaintiffs had proceeded in the suit, I most certainly should not have given the plaintiffs a penny of the costs incurred after that period; indeed, I should have endeavored to make them pay them."

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171. The Collins Company *v.* Walker.

January 26, 1859. *Kindersley, V. C.* — 7 *W. R.* 222.

THE plaintiffs being American manufacturers of edge-tools, which they stamped with the words "*Collins & Co., Hartford Cast Steel, Warranted,*" the defendant, in accordance with a customer's orders, made knives and stamped them with the plaintiffs' mark.

Suit for an injunction. The defendant stating that he had acted in ignorance of the plaintiffs' existence, and offering to give up the stamp, but refusing to pay the costs, *Held*, that he must submit to a perpetual injunction, and pay the costs.

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172. Churton *v.* Douglas.

March 17, 1859. *Wood, V. C.* — *Johns.* 174; 28 *L. J. Ch.* 841; 5 *Jur. N. S.* 887; 33 *L. T.* 57; 7 *W. R.* 365.

THE defendant, John Douglas, a partner in the firm of "*John Douglas & Co.*," having sold his share in the business

and good-will to his partners, the plaintiffs, who continued the business as "*Churton, Bankart & Hirst, late John Douglas & Co.*," afterwards set up another business in the same neighborhood as "*John Douglas & Co.*," and otherwise represented himself to be carrying on business in continuation of the old concern.

On motion by the plaintiffs, injunction granted to restrain the defendant from so doing.

P. 187. "The sale of the good-will of a business, without more, does not imply a contract on the part of the vendor not to set up again a *similar* business himself."

P. 188. "'Good-will,' I apprehend, must mean every advantage, every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself, that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business."

P. 189. "The name of a firm is a very important part of the good-will of the business carried on by the firm. . . . . The question of trade-mark is, in fact, the same question. The firm stamps its name on the articles. It stamps the name of the firm which is carrying on the business on each article, as a proof that they emanate from that firm; and it becomes the known firm to which applications are made, just as when a man enters a shop in a particular locality. And when you are parting with the good-will of a business, you mean to part with all that good disposition which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it."

173. Bradbury *v.* Dickens.

March 26, 1859. *Romilly, M. R.* — 27 *Beav.* 53; 28 *L. J. Ch.* 667; 33 *L. T.* 54.

THE parties being the proprietors of a weekly journal called "*Household Words*," on the dissolution of partnership between them, the defendant, who had also acted as editor, put out

advertisements in which he announced his intention of publishing a new periodical, and the discontinuance of the old one.

On motion by the plaintiffs for an injunction to restrain him from so doing, *Held*, that the defendant was at liberty to advertise the discontinuance of his connection with the periodical, but that he must not advertise simply that the publication would be discontinued, for the good-will of the publication, if of any value, was the property of the partnership.

"The property in a literary periodical like this is confined purely to the mere title, and the title of this work is "Household Words," and that forms part of the partnership assets, and must be sold for the benefit of the partners, if it be of any value."

174. Clement *v.* Maddick.

April 27, 1859. *Stuart, V. C.* — 1 *Giff.* 98; 5 *Jur. N. S.* 592; 33 *L. T.* 117.

THE plaintiffs being the proprietors of a newspaper called "*Bell's Life in London*," the defendants began to publish another newspaper under the name of "*The Penny Bell's Life and Sporting News.*"

On motion by the plaintiffs, injunction granted to restrain the defendants from publishing any newspaper under that name, or any other name in which the words "*Bell's Life*" should occur.

"This is an application in support of the right to property. . . . . The absence of a fraudulent intention is no defence against an application to the court for an injunction by the person whose property has been injured."[1]

175. Ingram *v.* Stiff.

June 3, 1859. *Knight Bruce and Turner, L. JJ.* — 5 *Jur. N. S.* 947; 33 *L. T.* 195.

THE plaintiff being the proprietor and publisher of a periodical called "*The London Journal*," the defendant, the for-

[1] See *Hogg* v. *Kirby*, 10.

mer proprietor and publisher of that journal, advertised a new periodical to be published by him under the name of "*The London Daily Journal.*"

On motion by the plaintiff, injunction granted by V. C. Wood to restrain the defendant from so doing, and continued on appeal.[1]

176. Smith *v.* Everett.

June 30, 1859. *Romilly, M. R.* — 27 *Beav.* 446; 29 *L. J. Ch.* 236; 5 *Jur. N. S.* 1332; 34 *L. T.* 58; 7 *W. R.* 605.

THE defendant, being the survivor of two partners in a banking business, sold the good-will of the business for a considerable sum. Suit by the widow and executrix of the deceased partner for the purpose of obtaining half the proceeds of the good-will for her testator's estate. *Held*, that the estate of a deceased partner was entitled to a share in the value of the good-will of the business, but that, in ascertaining the share, regard must be had to the rights of the surviving partner; and that in the case in question the share of the estate of the deceased partner in the proceeds of the good-will must be ascertained, regard being had to the facts, that (1.) the premises on which the business was carried on belonged to the survivor; (2.) the survivor was entitled to carry on a banking business at the same place after the sale of the good-will; (3.) the sole right of issuing bank notes survived to the survivor.

177. Mellersh *v.* Keen.

July 12, 1859; July 6, 1860. *Romilly, M. R.* — 27 *Beav.* 236; 28 *Beav.* 453.

PARTNERSHIP suit. *Held*, (1.) that partners in a banking business, who had obtained the whole benefit of the good-will and firm name, must account to the retiring partner for his share of the value of the good-will, etc., as at the date of the dissolution; (2.) that, in estimating such value, regard

[1] See *Hogg* v. *Kirby*, 10.

must be had to the fact that the continuing partners were at liberty to carry on the business and issue notes, without that being treated as part of the good-will; (3.) that the value had been correctly estimated by the chief clerk at one year's net annual profits, calculated on an average of the three years preceding the dissolution.

28 Beav. 456. "The difficulty of ascertaining the value of the good-will of a business is very great. . . . . But the court is bound to look at it in this point of view: What would it have produced, if it had been sold in the most advantageous manner, and under such circumstances that it would have produced the largest sum for all the parties interested?"

178. Dayton *v.* Wilkes.

September, 1859. *N. Y. Super. Ct.: Hoffman, J.* — 17 *How. Pr.* 510; *R. Cox*, 224.

PARTNERSHIP suit. *Held*, that on the dissolution of partnership between the proprietors of a newspaper called "Porter's Spirit of the Times," the good-will, title, etc., of the paper were partnership assets, and must be protected and disposed of for the benefit of the creditors of the firm, or of the partners jointly.

179. Wolfe *v.* Goulard.

October, 1859. *N. Y. Sup. Ct.: Ingraham, J.* — 18 *How. Pr.* 64; *R. Cox*, 226.

THE plaintiff being the manufacturer of "*Wolfe's Schiedam Schnapps*," the defendant began to sell another spirit as "*Voldner's Schiedam Schnapps.*"

On motion by the defendant, injunction which had been granted to restrain the defendant from so doing dissolved, on the ground that there was nothing distinctive in the words "Schiedam Schnapps," which alone had been imitated.

"No person can acquire a right to the exclusive use of words, applied as the name of an article sold by him, if in their ordinary acceptation they designate the same or a similar article."

180. Comstock *v.* White.

February, 1860. *N. Y. Sup. Ct.: Sutherland, J.* — 18 *How. Pr.* 421; *R. Cox*, 232.

THE plaintiffs and defendants having carried on business as pill manufacturers in partnership, under the name of "*A. J. White & Co.*," the defendants left the plaintiffs and carried on the same business on their own account, under the old name.

On motion by the defendants, injunction which had been granted continued, so far as it restrained the defendants from applying to their pills the term "*Dr. Morse's Indian Root Pills*," in imitation of the plaintiffs', but dissolved so far as it restrained the use by the defendants, in connection with the manufacture of pills, of the name of their firm, "*A. J. White & Co.*," the name of one of the defendants being "*A. J. White;*" and *Held*, that exaggerated commendations of their medicines did not disentitle the plaintiffs as against defendants who had been engaged with them in the same business.

181. Crookes *v.* Petter.

February 16, 1860. *Romilly, M. R.* — 6 *Jur. N. S.* 1131; 3 *L. T. N. S.* 225.

THE plaintiff being the editor of a journal called *The Photographic News*, under an agreement with the defendants, the proprietors of the journal, by which it was provided that the title should not be altered without mutual consent, the defendants terminated the agreement with the plaintiff, and omitted his name from the title-page. Motion by the plaintiff for an injunction to restrain the defendants from so doing refused, on the ground that the name of the editor, appearing on the title-page, formed no part of the title.

182. R. *v.* Jones.

March, 1860. *Middlesex Sessions.* — *Lloyd on Trade-Marks*, 11; *Poland on the Merchandise Marks Act*, 1862, p. 33.

On an indictment for obtaining money by false pretences, the prisoner having used spurious wrappers similar to those in which Borwick's Baking Powder was inclosed, —

Prisoner convicted — 3 years' penal servitude.

183. R. *v.* Gray & Gosling.

Lloyd on Trade-Marks, 11.

On an indictment for obtaining money by false pretences, the prisoners having fraudulently used labels imitated from those placed on Allsopp's ales, —

Prisoners convicted — 12 months' hard labor.

184. Barrows *v.* Knight.

March, 1860. *Rhode I. Sup. Ct.* — 6 *R. I.* 434; *R. Cox*, 238.

The plaintiff being a manufacturer of cotton cloth, which he stamped with the words "*Roger Williams' Long Cloth*," the defendants marked other cotton cloth with the name "*Roger Williams*."

Action on thecase. Demurrer overruled, and *Held*, (1.) that the name was a good trade-mark, being the name of a dead celebrity; (2,) that exact imitation was not requisite to entitle the plaintiff to his remedy.

185. Howe *v.* Searing.

March, 1860. *N. Y. Super. Ct.* — 6 *Bos.* 354; 10 *Abb. Pr.* 264; 19 *How. Pr.* 14; *R. Cox*, 244.

The plaintiff sold the good-will of his baking business at New York, known as "*Howe's Bakery*," to B., covenanting not to resume the same business in the same city without B.'s consent. He afterwards purchased from B. the right to

resume business at New York, covenanting not to interfere with the latter's business. The defendant bought the bakery from B., and continued to trade in the old name of "*Howe's Bakery.*"

Action for an injunction. *Held*, that the plaintiff was entitled to an injunction to restrain the defendant from using the old name of "*Howe's Bakery*," and otherwise using the plaintiff's name in the business, on the ground that the sale of a good-will did not of itself give a right to the use of the trade name.

Per Hoffman, J. "It is, I apprehend, a well settled rule that the good-will of a partnership business does not survive to a continuing partner. It belongs to the firm as much as the ordinary stock in trade, and must be disposed of in some manner for the benefit of the firm."

186. Colladay *v.* Baird.

1860. *Phila. C. P.: Ludlow, J.* — 4 *Phila.* 139; *R. Cox*, 257.

THE plaintiff being a manufacturer of cotton goods known as "*Aramingo Check*," which he sold ticketed with a label on which the words "*Aramingo Mills*" were prominent, the defendant began to sell other goods, also bearing a label on which the name "*Aramingo Mills*" appeared.

Injunction to restrain the defendant from the use of the words "*Aramingo Mills*" refused, on the ground that the manner in which the defendant used the words was so different from that in which the plaintiff used them that deception was not to be anticipated.[1]

187. Corwin *v.* Daly.

June, 1860. *N. Y. Super. Ct.* — 7 *Bos.* 222; *R. Cox*, 265.

THE plaintiffs selling gin in bottles labelled "*Club-House Gin*," the defendants sold other gin in bottles labelled "*London Club-House Gin.*"

Injunction to restrain the defendants from using the term

[1] The decision in this case is entirely without force. See *Burnett* v. *Phalon*, 277.

"*Club-House*" gin refused, on the ground that the term was generally understood to be indicative of a certain superior quality, and not of the plaintiffs' manufacture.

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188. Byass *v.* Sullivan.

July, 1860. *N. Y. Sup. Ct.: Bonney, J.* — 21 *How. Pr.* 50 ; *R. Cox*, 278.

THE defendant sold bottled porter labelled in imitation of the plaintiff's labels with the words "*Best Stout Porter from R. B. Byass, London,*" and a fac-simile of his signature.

On a reference to ascertain the damages sustained by the plaintiff by reason of the defendant's wrongful conduct:

Held, that the defendant was privileged from answering certain questions, and producing books or papers which might tend to convict him of a criminal offence, but that in other respects he must make full discovery.

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189. Robertson *v.* Quiddington.

July 17, 1860. *Romilly, M. R.* — 28 *Beav.* 529.

THE owner of a two thirds share in a partnership business having bequeathed two thirds of his share in the good-will alone to his son-in-law, and his share in the partnership property, apart from the good-will, having been assigned by his executors to the surviving partner:

Held, that notwithstanding that the executors had assented to the bequest of the share of the good-will, it was not competent for the son-in-law and legatee to file a bill against the legatee of the remaining one third part of the testator's share of the good-will, and the surviving partner, who was entitled to all the rest of the good-will, to have the bequest specifically made good, and also, on the authority of *Lewis* v. *Langdon*, that the firm name survived to the surviving partner.

"The good-will is a valuable and tangible thing in many cases, but it is never a tangible thing unless it is connected with the business itself, from which it cannot be separated, and I never knew a case in which it has been so treated."

190. Brook *v.* Evans.

July 26, August 2, 1860. *Stuart, V. C.* — 29 *L. J. Ch.* 616; 6 *Jur. N. S.* 1025; 2 *L. T. N. S.* 740. *Knight Bruce and Turner, L. JJ.* — 29 *L. J. Ch.* 617; 3 *L. T. N. S.* 571.

THE plaintiffs having instituted a suit for an injunction to restrain the defendants from selling thread under the name of "*Glacé*," in infringement of their rights, the motion for injunction was, on the ground of the plaintiffs' delay, ordered to stand over, liberty being given to bring an action. The plaintiffs in the suit printed and distributed a report of the proceedings, containing, among other things, a statement that they had established their claim to be the first who had used the word in question, the fact being that no evidence had been gone into.

Motion by the defendants for an injunction to restrain the publication of this report refused, on the ground that it was not calculated to obstruct the course of justice.

191. Hobbs *v.* Français.

September, 1860. *N. Y. Super. Ct.: Bosworth, C. J.* — 19 *How. Pr.* 567; *R. Cox*, 287.

THE plaintiff being the manufacturer of a skin-powder which he called "*Meen Fun*," and sold in boxes bearing a particular label, the defendant sold another powder in boxes bearing a substantially identical label.

Motion by the plaintiff for an injunction to restrain the defendant from infringing his rights refused, on the ground that the plaintiff's own labels falsely represented his American compound to be made in England and patronized by the Queen, and also, that it was not established that the term "*Meen Fun*" was indicative of the plaintiff's manufacture.[1]

[1] See *Pidding* v. *How*, 60.

192. Wade *v.* Jenkins.

November 20, 1860. *Stuart, V. C.* — 2 *Giff.* 509; 30 *L. J. Ch.* 633; 7 *Jur. N. S.* 39; 3 *L. T. N. S.* 464.

PARTNERSHIP suit.

On the determination of a partnership carried on under articles which provided that "the good-will should belong to the partners in the proportion of their shares in the business, but should not be taken into account in the accounts of the partnership;" and also that "on the determination of the partnership, a general account and valuation of the property and effects of the partnership should be taken;" *Held*, that in the valuation of the partnership property the good-will must be included.

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193. Harper *v.* Pearson.

December 20, 1860. *Wood, V. C.* — 3 *L. T. N. S.* 547.

ON the expiration of a lease to the plaintiffs, Messrs. Harpers & Moore, of certain fire-brick works, those works, but not the mines from which the clay there worked was obtained, were leased by the defendants, who then issued cards and circulars in which they styled themselves "*E. & J. Pearson (late Harpers & Moore)*," and which were calculated to lead the public to the belief that the former lessees had retired from business, though they were, in fact, continuing to carry on business elsewhere.

On motion by the plaintiffs, injunction granted to restrain the issue of the cards and circulars, and the misrepresentations; and *Held*, that an injunction would, if asked for by him, have been granted almost as a matter of course, to the owner of the mines of fire-clay leased by the plaintiffs, but not by the defendants.

194. Dixon *v.* Fawcus.

January 22, 1861. *Queen's Bench.* — 3 *Ell. & Ell.* 537; 30 *L. J. Q. B.* 137; 7 *Jur. N. S.* 895; 3 *L. T. N. S.* 693; 9 *W. R.* 414.

THE plaintiff having, in accordance with the defendant's order, manufactured fire-bricks marked with the name "*Ramsay*," that name being the trade-mark of one G. H. Ramsay, the latter filed a bill in chancery against the plaintiff for an injunction and an account, which resulted in the plaintiff compromising the matter at a considerable expense.

Action by the plaintiff for the recovery from the defendant of the loss which his order had occasioned to the plaintiff.

Demurrer, on the ground that the defendant had no right to compromise the suit, since the absence of fraudulent intention on his part prevented him from being liable in equity — overruled; and *Held*, that the plaintiff was justified in compromising the suit, though innocent of intentional fraud, since that would have been no defence in equity, and that he was entitled to recover from the defendant.

195. Dale *v.* Smithson.

February, 1861. *N. Y. C. P.* — 12 *Abb. Pr.* 237; *R. Cox*, 282.

THE plaintiffs being manufacturers of thread, which they sold in packets labelled with the words, "*Courtria Flax. Thomas Nelson & Co. Warranted fast colors, & 16 oz.*," the defendants sold other thread in packages similarly labelled.

Action at law. Judgment having been rendered for the plaintiffs:

Held, on appeal, that the plaintiffs were entitled to succeed, notwithstanding that the name placed by them on their label was fictitious, since the manner in which it was there stated was adopted without any fraudulent intention or actual deception of the public.[1]

[1] See *Pidding* v. *How*, 60.

196. Dent *v.* Turpin.

Tucker *v.* Turpin.

April 22, 1861. *Wood, V. C.* — 2 *J. & H.* 139 ; 30 *L. J. Ch.* 495; 7 *Jur. N. S.* 673; 4 *L. T. N. S.* 637; 9 *W. R.* 548.

E. J. DENT, who carried on at three several shops the business of a watchmaker, and marked his goods with the trade-mark, "*Dent, London*," bequeathed the business carried on at two of these shops to F. Dent, and that carried on at the third shop to R. Dent, which persons thenceforward carried on distinct businesses at these shops, and each continued to use the trade-mark. After the deaths of both these persons the defendants began to deal in watches marked with their trade-mark.

Suits for injunction and account by the representatives of both firms. On demurrer in the first suit, *Held*, that each plaintiff might, without averring special damage, sue alone for an injunction, and for the delivery up of the marked articles for erasure, and also for an account of profits and for payment to the respective plaintiff of the part of such profits to which she was entitled, and that the demurrer must be overruled.[1]

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197. The Emperor of Austria *v.* Day and Kossuth.

May 4, June 12, 1861. *Stuart, V. C.* — 2 *Giff.* 628; 30 *L. J. Ch.* 690; 7 *Jur. N. S.* 483 ; 4 *L. T. N. S.* 274 ; 9 *W. R.* 568. *Lord Campbell, C.; Knight Bruce and Turner, L. JJ.*; 3 — *De G., F. & J.* 217; 30 *L. J. Ch.* 690 ; 7 *Jur. N. S.* 639 ; 4 *L. T. N. S.* 494; 9 *W. R.* 712.

THE plaintiff being the Emperor of Austria and King of Hungary, the defendants, without his authority, issued notes purporting to be Hungarian notes.

Injunction granted to restrain the defendants from issuing such notes, on the ground of property in the Emperor.

Per Lord Campbell, C. (3 De G., F. & J. 240). "I consider that this court has jurisdiction by injunction to protect property from an

[1] This case is to be taken as of an exceptional character; it is not in accord with settled principles. See *Bury v. Bedford*, 222.

act threatened, which, if completed, would give a right of action. I by no means say that in every such case an injunction may be demanded as of right; but if the party applying is free from blame and promptly applies for relief, and shows that by the threatened wrong his property would be so injured that an action for damages would be no adequate redress, the injunction will be granted."

Per Turner, L. J. (Ib. 253). "I agree that the jurisdiction of this court in a case of this nature rests upon injury to property, actual or prospective, and that this court has no jurisdiction to prevent the commission of acts which are merely criminal, or merely illegal, and do not affect any rights of property; but I think there are here rights of property quite sufficient to found jurisdiction in this court"

198. Henderson *v.* Jorss.

June 21, 1861. *Wood, V. C.—Seton, 4th ed.* 236; *cited in Lloyd on Trade-Marks*, 54.

THE plaintiff's cloths being exported to the Chinese market, and stamped with the figure of a lion or elephant, from which the cloths had come to be known as the "*lion chop*," or "*elephant chop*," the defendants exported other cloths also stamped with a lion or elephant, so as to produce deception.

Injunction granted to restrain the defendants from so doing; and *Held*, that the fact that round the figures the respective names of the parties appeared was not sufficient to prevent deception, or to operate as a defence.

199. Cartier *v.* Westhead.

July 11, 1861. *Wood, V. C.*

THE plaintiff being a French cotton manufacturer, who sold his cotton in parcels labelled with a cross and the letters "*C. B.*" (from which the cotton had come to be known as "Cross Cotton"), the defendants began to deal in cotton of another make, labelled with an anchor (the flukes of which were concealed by the wrapping thread) and the letters "*W. T.*," and supplied such cotton so marked, in answer to an inquiry for "*cross embroidery cotton.*"

On motion by the plaintiff, injunction granted to restrain the defendants from selling cotton, not the plaintiff's, under the name of "*French cross embroidery cotton*," or "*cross embroidery cotton*," or "*cross cotton*," and from using deceptive labels.

200. Cartier *v.* May.

July 12, 1861. *Wood, V. C.—Cited in Lloyd on Trade-Marks*, 55–77.

An injunction having been granted in April, 1859, to restrain the defendant from selling cotton in parcels labelled in imitation of the plaintiff's, which bore a cross and the initials "*C. B.*," from which it had acquired the name of "*Cross Cotton*," the defendant adopted an altered label containing the words "*cross cotton*," and calculated in other respects to deceive.

Motion to commit refused, the defendant having avoided a breach of the injunction, and the plaintiff having delayed to enforce his rights for fifteen months; but the injunction enlarged to cover the new fraud, and the defendant to pay all costs of the application.

201. Bowman *v.* Floyd.

November, 1861. *Mass. Sup. Ct.: Merrick, J.* — 85 *Mass.* (3 *Allen*) 76.

Two of the defendants having been in business with J. G. Loring, under the style of "*John G. Loring & Co.*," after his death they took the two remaining defendants into partnership, and continued to use the old name as before, both as their trade name and as a trade-mark on their goods.

Suit by the executors of J. G. Loring for an injunction to restrain the defendants from so doing. *Held*, that, so far as the name was used as a trade-mark on goods, the defendants had acquired by user a right to continue so to use it; but that, so far as it was used as a trade name, the representatives of J. G. Loring were entitled, under the Massachusetts Statute (Gen. St. c. 56), to restrain them from continuing to use it without their consent.

202. Turner *v.* Major.

January 15, 1862. *Stuart, V. C.* — 3 *Giff.* 442; 8 *Jur. N. S.* 909; 5 *L. T. N. S.* 600; 10 *W. R.* 243.

PARTNERSHIP suit. On a dissolution of partnership between two partners, whose business had been carried on at two distinct establishments in separate localities, superintended by the partners respectively, it was agreed that the partnership premises, stock, good-will, etc., should be sold for the benefit of the partners, and until sale should vest in receivers.

On motion by the one partner, injunction granted to restrain the other, until the sale, from carrying on the business in one of the localities on his own account.

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203. Howe *v.* McKernan.

February 10, 1862. *Romilly, M. R.* — 30 *Beav.* 547.

THE defendant, who had been the London agent of the plaintiff, an American maker of sewing-machines, called "*The Howe Sewing-Machines*," continued, after dismissal, to advertise himself as the plaintiff's agent, and to sell as the "*Howe*" sewing-machines, machines not manufactured by the plaintiff.

Suit for an injunction and damages or an account.

On exceptions to interrogatories, the defendant having refused discovery of all the machines sold by him, the price, profit, names of the purchasers, and other particulars, on the ground that he would thereby disclose the names of his customers and secrets of his business: *Held*, that full discovery must be made.

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204. Cartier *v.* Carlile.

March 7, 1862. *Romilly, M. R.* — 31 *Beav.* 292; 8 *Jur. N. S.* 183.

THE plaintiff made and sold cotton for embroidery, which became known as "*Cross Cotton*," from its being labelled with

the trade-mark of a cross, together with the letters "*C. B.*" The defendants manufactured and sold cotton similarly marked, except that for "*C. B.*" was substituted "*C. S.*"

Suit for an injunction to restrain the defendants from infringing the plaintiff's rights.

Held, that an injunction must be granted, and also an account, notwithstanding that the defendants stated themselves to have been ignorant of the rights, and even of the existence of the plaintiff.

"I am of opinion that the liability to account for the profits is incident to the injunction, and that the fact of the defendant not knowing to whom the trade-mark he copies belongs does not in the slightest degree affect the right of the owner to an injunction, and to an account of the profits, as soon as he ascertains that it is imitated and used."

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205. Young *v.* Macrae.

March 21, 1862. *Wood, V. C.* — 9 *Jur. N. S.* 322.

THE plaintiffs being the owners of a patent for the distillation of "*Paraffin*" and "*Paraffin Oil*," the defendant began to deal in another oil, under the name of "*Paraffin Oil*," or "*American Paraffin Oil.*"

Motion by the plaintiffs for an injunction to restrain the defendant from using those names refused, on the ground that although (1.) a fancy name, "and the more ridiculous it is the better it is," which is recognized as indicating the goods of a particular manufacturer, will be protected; (2.) where a person "has found out an article which is a natural product, and has given that natural product a name," that name becomes designatory of the natural product and may be generally used; and (3.) if the name has been usually applied to goods manufactured by a particular person, not because they are of his make, but because he, as having taken out a patent, could alone make them, then, after the expiration of the patent, the name may be generally used; or even during the continuance of the patent, if a new means of getting at

the natural product is discovered, which does not infringe the patent.[1]

206. Parsons *v.* Hayward.

April 28, June 11, 1862. *Romilly, M. R.* — 31 *Beav.* 199; 31 *L. J. Ch.* 666; 8 *Jur. N. S.* 474; 6 *L. T. N. S.* 523; 10 *W. R.* 531. *Lord Westbury, C.* — 31 *L. J. Ch.* 666; 8 *Jur. N. S.* 924; 6 *L. T. N. S.* 628; 10 *W. R.* 651.

PARTNERSHIP suit. The plaintiff and defendant entered into partnership as tailors for seven years, the plaintiff being a mere sleeping partner, and the business being managed by the defendant alone, and in his name. No notice of dissolution having been given, the defendant continued, after the expiration of the seven years, to carry on the business upon the same premises and in his own name. *Held*, that the defendant must account to the plaintiff for his share of the profits since the expiration of the seven years.

Per M. R. "It is quite clear that" at the end of the seven years "the place of business should have been sold; for although it is true that a house may be of little value in itself, if held at rack-rent, still it may be of great value as a place for carrying on the business, and there may be a peculiar species of value attached to a particular spot where a business has for a long time been carried on, and which may be an asset of the partnership of very high value."

207. Burrows *v.* Foster.

May 8, 1862. *Knight Bruce and Turner, L. JJ.* — 1 *N. R.* 156; 32 *Beav.* 18; *Seton, 4th ed.* 257.

IT having been agreed by deed that the two partnership firms of Foster, Lacy & Co., and Bashall, Lacy & Co., insurance brokers, should be dissolved, and their estates liquidated by the plaintiff and another, the plaintiff to "have the benefit and advantages of the businesses and connections" of the former two partnership firms, and to be at liberty to carry on

[1] See *Burnett* v. *Phalon*, **277**; *Congress, &c., Spring Co.* v. *H. R. Congress Spring Co.* **354**; *Singer Man. Co.* v. *Wilson*, **477**.

the businesses in a new partnership with Lacy, who had been a partner in both firms, the defendant, who had been a partner in Foster, Lacy & Co., issued circulars to the connections of his old firm, stating the dissolution, and his intention to continue to carry on business, and asking for orders.

Injunction granted to restrain the defendant from representing by circular or letter that his new business was a continuation of the business of either of the former firms, and from soliciting the customers of the former firms.

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208. Burfield *v.* Rouch.

June 13, 1862. *Romilly, M. R.* — 31 *Beav.* 241.

PARTNERSHIP suit. The parties having carried on business in partnership under articles which provided that, on the dissolution of partnership, the defendant should have the option of taking over the lease of the partnership premises, stock in trade, etc., at a valuation (the lease of the premises being the private property of the plaintiff), but made no mention of the good-will:

Held, that, in the valuation of the lease, the plaintiff was precluded by the articles from having any consideration paid to the fact that a business had long been carried on upon the premises, since that would be to add the value of the good-will to the value of the lease.

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209. Oldham *v.* James.

November 5, 1862; January 27, 1863. *Smith, M. R. of I.* — 13 *Ir. Ch.* 393. *Brady, C. of I., and Blackburn, L. J.* — 14 *Ir. Ch.* 81.

THE respondents being the proprietors of a compound which they called "*Lieutenant James' Blistering Compound*," and sold under a particular trade-mark, and the petitioner having sold another compound under a similar trade-mark, an agreement was entered into between the parties by which all claims of the respondents in respect of the infringement were compromised, both with regard to the infringer himself and

to persons who had purchased from him. The respondents subsequently took proceedings against persons who had purchased the spurious goods from the petitioner before the compromise, and were still selling them.

Petition for specific performance of the agreement.

Held, (1.) that the agreement only compromised sales made before its date, and did not authorize future sales, even of goods bought before such date; (2.) and further, that, even if it did profess to authorize them, it would involve a fraud on the public, and could not be specifically enforced, so as to prevent the owner of the trade-mark from suing the persons selling the spurious goods.

210. Clark *v.* Leach.

December 4, 1862; January 30, 1863. *Romilly, M. R.* — 32 *Beav.* 14; 32 *L. J. Ch.* 290; 9 *Jur. N. S.* 165; 8 *L. T. N. S.* 40; 11 *W. R.* 227; 1 *N. R.* 155. *Lord Westbury, C.* — 1 *De G., J. & S.* 409; 32 *L. J. Ch.* 290; 9 *Jur. N. S.* 610; 8 *L. T. N. S.* 40; 11 *W. R.* 351.

PARTNERSHIP suit.

The parties carried on business in partnership under articles, by which it was provided that they should be partners for seven years, and that, in certain events, the one should have a right to give notice to the other of the termination of the partnership, in which case the partner receiving the notice should "be considered as quitting the business for the benefit of the partner giving the notice." After the expiration of the seven years such notice was given by the plaintiff to the defendant, who then set up business in the neighborhood as "*R. Leach & Co., late Leach & Clark*," the plaintiff continuing to use the old name of "*Leach & Clark*." *Held*, that, the seven years having expired, the partnership had become a partnership at will, and the clause did not apply to the altered circumstances.

Per M. R. (32 Beav. 18). "Has not the defendant a right to say that he lately belonged to a certain firm, and cannot he advertise that fact? The difficulty is, if he cannot be prevented from carrying

on the same business, is he not at liberty to solicit the public at large, and to do so by telling, as is the truth, that he belonged to a late firm?"

211. Jurgensen *v.* Alexander.

December, 1862. *N. Y. C. P.: Brady, J.* — 24 *How. P. R.* 269; *R. Cox*, 298.

THE plaintiff being a maker of watches, which he stamped with the name "*Jules Jurgensen, Copenhagen*," the defendant exposed other watches for sale bearing a similar stamp.

Action for an injunction to restrain the defendant from so doing. *Held*, that the injunction must be granted, and that the marked watches must be produced for the spurious marks to be erased, and that the defendant must pay the costs.

212. Woodward *v.* Lazar.

January, 1863. *Cal. Sup. Ct.* — 21 *Cal.* 448; *R. Cox*, 300.

THE plaintiff having erected on a plot of land of which he was tenant a hotel which he called "*The What Cheer House*," and having afterwards built a new "*What Cheer House*" on an adjoining plot, and surrendered the former plot, the defendants purchased the first plot and house from the owners, after the surrender, and opened a hotel there, under the name of "*The Original What Cheer House*" ("original" being in small letters on the sign).

Injunction granted to restrain the defendants from using the name "*What Cheer House*" as the name of any hotel in the same city.

Per Norton, J. "A person may have a right, interest, or property in a particular name, which he has given to a particular house, and for which house, under the name given to it, a reputation and good-will may have been acquired; but a tenant, by giving a particular name to a building which he applies to some particular use, as a sign of the business done at that place, does not thereby make the name a fixture to the building, and transfer it irrevocably to the landlord."[1]

[1] See *Howard* v. *Henriques*, 108.

213. Edelsten *v.* Edelsten.

January 28, 1863. *Lord Westbury, C.* — 1 *De G., J. & S.* 185; 9 *Jur. N. S.* 479; 7 *L. T. N. S.* 768; 11 *W. R.* 328; 1 *N. R.* 300.

THE plaintiff being a manufacturer of wire which he sold with metal labels, or tallies, attached to it, bearing his trade-mark, an anchor, from which his wire had acquired the name of "*Anchor Brand Wire*," the defendants made and sold wire with tallies bearing an anchor and small crown, and called the wire "*Crown and Anchor Wire*."

Suit for an injunction and account.

Held, (1.) that the plaintiff was entitled to an injunction to restrain the infringement; (2.) that an account would only be given with the injunction in respect of any user by a defendant after he had become aware of the prior ownership; (3.) that proof of fraud was of the essence of the action at law, but that the Court of Chancery would "act on the principle of protecting property alone," and that the plaintiff need not prove fraud or inferiority of quality; (4.) that if the goods were sold for the purpose of being resold in the market the plaintiff would have his equitable remedy, though all the immediate purchasers knew that the goods were not the plaintiff's; (5.) that proof of actual deception was not necessary in equity, if the court were satisfied that the resemblance was such as to be likely to cause the one mark to be mistaken for the other; (6.) that where the plaintiff was found entitled to the relief he asked, he would be entitled to the costs of the suit in which it was given.

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214. The Leather Cloth Co. (Limited) *v.* Hirschfeld. (1.)

March 11, 1863. *Wood, V. C.* — 1 *N. R.* 551 (*and see* 1 *H. & M.* 295).

THE plaintiffs being manufacturers of leather cloth, the defendants, trading as "*The Anglo-American Leather Cloth Co.*," sold a similar article under a trade-mark similar to the plaintiffs'.

Suit for an injunction to restrain the defendants from so

doing. *Held*, that an injunction must be granted, and an inquiry as to damages directed, notwithstanding that the plaintiffs' trade-mark contained the words "tanned leather cloth, patented Jan. 24th, '56," and that the plaintiffs' leather cloth was, in fact, no longer tanned or patented, since the statement was correct when it was first inserted in the trade-mark.[1]

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215. Hall *v.* Barrows.

March 16, December 21, 1863. *Romilly, M. R.* — 32 *L. J. Ch.* 548; 9 *Jur. N. S.* 483; 8 *L. T. N. S.* 227; 11 *W. R.* 525; 1 *N. R.* 543. *Lord Westbury, C.* — 4 *De G., J. & S.* 150; 33 *L. J. Ch.* 204; 10 *Jur. N. S.* 55; 9 *L. T. N. S.* 561; 12 *W. R.* 322; 3 *N. R.* 259.

THE plaintiffs were the executors of one of two partners in an iron-master's business carried on under articles which gave the last surviving partner the option of taking over the "stock belonging to the partnership" at a valuation.

Suit for an account, sale of the business, and good-will, etc. *Held*, by the M. R.: (1.) That the business and good-will must be sold as a going concern; (2.) that the trade-mark "*B. B. H.*" with a crown, used by the firm (the initials being those of the original partners in the firm), was a personal and not a local mark, and could not be sold with the good-will, since it would induce a belief that the purchaser was the old firm, and so deceive the public; (3.) that the surviving partner could not be prevented from using the mark after the sale of the good-will of the business, but that he would, on the contrary, retain the exclusive right of using it.

Held, by Lord Westbury, C.: (1.) that the surviving partner having an option, under the partnership articles, of taking over the business at a valuation, the value must be ascertained in chambers, and not by means of a sale; (2.) that there was no evidence to show that the trade-mark was personal, — that it, therefore, was a subject of sale, and as such must be taken into account in the valuation to the surviving partner; (3.) that the good-will of the business must be

[1] See *Leather Cloth Co.* v. *American Leather Cloth Co.* 223.

taken into account and valued, as being included in the "stock belonging to the partnership; (4.) that the valuation must be made on the footing of the surviving partner being at liberty to set up and carry on the same business as that of the partnership.

Per M. R. "The interference of a court of equity cannot depend on the length of time the manufacturer has used the trade-mark."

Per L. C. "A name, though originally the name of the first maker, may in time become a mere trade-mark or sign of quality, and cease to denote or to be current as indicating that any particular person is the maker. In many cases a name once affixed to a manufactured article continues to be used for generations after the death of the individual who first affixed it. In such cases the name is accepted in the market either as a brand of quality, or it becomes the denomination of the commodity itself, and is no longer a representation that the article is the manufacture of any particular person.

"There can be no right to the exclusive ownership of any symbols or marks universally in the abstract; thus, an iron-founder who has a particular mark for his manufactures in iron could not restrain the use of the same mark when impressed in cotton or woollen goods; for a trade-mark consists in the exclusive right to the use of some name or symbol as applied to a particular manufacture or vendible commodity, and such exclusive right is property.

"Imposition on the public is necessary for the plaintiff's title, but in this way only, that it is the test of the invasion by the defendant of the plaintiff's right of property; for there is no injury if the mark used by the defendant is not such as is mistaken, or is likely to be mistaken, by the public for the mark of the plaintiff; but the true ground of this court's jurisdiction is property."

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216. Hopkins *v.* Hitchcock.

April 20, 1863. *Common Pleas.* — 14 *C. B. N. S.* 65; 32 *L. J. C. P.* 154; 9 *Jur. N. S.* 896; 8 *L. T. N. S.* 204; 11 *W. R.* 597; 2 *N. R.* 32.

THE firm of "*Snowden & Hopkins*" having manufactured bar iron and stamped it with "*S. & H.*" and a crown, when that firm was replaced by the new firm of "*Hopkins & Co.*"

the latter stamped the same quality of iron with "*H. & Co.*" and a crown. The defendant bought iron from Hopkins & Co., described in the bought and sold notes as "*S. & H.* (*crown*) *common bars*," but the iron, when tendered, being found to be marked "*H. & Co.*" with a crown, was rejected.

Action for non-acceptance.

The jury having found a verdict for the plaintiffs, on the ground that the mark was not a material part of the bargain, and that the defendant had substantially what he had bargained for:

Held, that the contract was for iron of a particular quality, and not for iron bearing a particular brand, and that the plaintiffs were entitled to recover.

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217. Woollam *v.* Ratcliff.

May 27, 1863. *Wood, V. C.*—1 *H. & M.* 259.

THE plaintiff being a silk throwster, who was in the habit of making up his silk in a distinctive manner, and affixing to each bundle a label with the mark "St. A*****" (St. Alban's), the defendant, in obedience to an order, made up silk in the same manner, omitting the trade-mark.

Injunction to restrain the defendant from infringing the plaintiff's rights refused, on the ground that there was no actual deception proved, and that, though there was the express order to imitate the plaintiff's bundle, with the omission of the mark, it was not established that deception was probable.

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218. Batty *v.* Hill.

May 28, 1863. *Wood, V. C.*— 1 *H. & M.* 264; 8 *L. T. N. S.* 791; 11 *W. R.* 745; 2 *N. R.* 265.

THE plaintiff being a prize medallist at the London International Exhibition, 1862, the defendant, who had not exhibited or obtained any medal there, placed on his goods the words, "*Prize Medal*, 1862."

[1] See *Williams* v. *Johnson*, 150.

Motion by the plaintiff for an injunction to restrain the defendant from so doing refused, on the ground that no one could obtain a right of property in the nature of a trade-mark in a prize medal, since all medallists could use it, and that even if it were possible to do so, the defendant had used it first.[1]

219. Schiele *v.* Brakell.

May 30, 1863. *Stuart, V. C.* — 11 *W. R.* 796; *Seton, 4th ed.* 253.

THE plaintiffs having carried on business at North Moor, Oldham, as "*C. Schiele & Co.*," or "*Christian Schiele & Co.*," the defendants bought their manufacturing business, and obtained from them a lease of their business premises, and exclusive licenses for the use of certain patents owned by them. The defendants caused all letters addressed to "*C. Schiele & Co.*" to be brought to them, and executed orders intended for the plaintiffs, for the manufacture of articles under other patents than those which the defendants were licensed to use.

Injunction granted to restrain the defendants from opening such letters, executing such orders, etc.

220. McIntyre *v.* Belcher.

June 5, 1863. *Common Pleas.* — 14 *C. B. N. S.* 654; 32 *L. J. C. P.* 254; 10 *Jur. N. S.* 239; 8 *L. T. N. S.* 461; 11 *W. R.* 889; 2 *N. R.* 324.

THE plaintiffs having entered into an agreement with the defendant for the sale to him of a surgeon's practice and the good-will of it, and having thereby further contracted not to practise in the neighborhood for ten years, to introduce the defendant to his patients, etc., the defendant contracting to pay the plaintiffs a certain proportion of the profits at the end of each of the first four years, the defendant incapacitated himself from carrying on the business and from obtaining any receipts from it.

Action on the agreement. *Held*, that, though there was no

[1] See *Taylor* v. *Gillies*, 448.

special undertaking, there was an implied undertaking to keep up the practice.

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221. The London Assurance *v.* The London and Westminster Assurance Corporation (Limited).

June 11, 1863. *Stuart, V. C.* — 32 *L. J. Ch.* 664; 9 *Jur. N. S.* 497; 8 *L. T. N. S.* 497.

MOTION by the plaintiffs for an injunction to restrain the defendants from using their name (as above) or any other name resembling that of the plaintiffs refused.

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222. Bury *v.* Bedford.

June 25, 1863; May 3, 1864. *Romilly, M. R.* — 32 *L. J. Ch.* 741; 9 *Jur. N. S.* 956; 8 *L. T. N. S.* 847; 11 *W. R.* 973; 1 *N. R.* 5. *Knight Bruce and Turner, L. JJ.* — 4 *De G., J. & S.* 352; 33 *L. J. Ch.* 465; 10 *Jur. N. S.* 503; 10 *L. T. N. S.* 470; 12 *W. R.* 726; 4 *N. R.* 180.

THE defendant, John Bedford, a steel manufacturer at Sheffield, acquired from the Cutlers' Company, though not a member of the company, a mark consisting of the figure of a lion couchant, surmounted by crossed arrows, with the initials "*J. O. B. S.*" (John Bedford, Oughtibridge, Sheffield) written in the spaces formed by the crossings of the arrows. He also purchased the mark "*Wm. Ash & Co.*" On his entering into partnership with certain other persons, the articles of partnership provided that the corporate mark should be used by the partnership, and should be a partnership asset, and that at the expiration of the partnership the several partners should be entitled to use it for the remainder of their lives. The corporate mark was used by the firm on certain classes of goods; "*Wm. Ash & Co.*" on others. The partnership property and the separate estates of the partners having been assigned by a creditors' deed to trustees for the creditors of the firm, the plaintiff bought from the trustees the partnership property and trade-marks.

Suit for an injunction to restrain John Bedford from using or granting the right to use the trade-marks.

Held, by the M. R., that, as to the corporate mark, the injunction could only be granted to restrain an assignment of the right to use, and not to restrain the use of the mark by the defendant, and that no order as to the mark "*Wm. Ash & Co.*" should be made.

Held, by the L. JJ.: (1.) that, at all events, where owned by a non-freeman of the Cutlers' Company, a cutlers' corporate mark was assignable; (2.) that the assignability of a mark containing a personal element must depend upon the circumstances of the particular case; (3.) that the corporate mark in question was not so personal as to be incapable of assignment; (4.) that all the interest of the defendant in the mark passed to the trustees under the creditors' deed; (5.) that the purchase by the plaintiff from the trustees was good; (6.) that the plaintiff thereby acquired a right to exclude the defendant from the use of the mark; (7.) that the mark "*Wm. Ash & Co.*" passed to the partnership on its formation, there being no express provision to the contrary; and that, therefore, the injunction must go to the full extent prayed.

Per Turner, L. J. (4 De G., J. & S. 374). "The whole trade is carried into the partnership, and the trade-mark is but an element of the trade."

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223. The Leather Cloth Co. (Limited) *v.* The American Leather Cloth Co. (Limited).

July 8, December 21, 1863; May 12, 1865. *Wood, V. C.* — 1 *H & M.* 271; 32 *L. J. Ch.* 721; 8 *L. T. N. S.* 829; 11 *W. R.* 931; 2 *N. R.* 481. *Lord Westbury, C.* — 4 *De G., J. & S.* 137; 33 *L. J. Ch.* 199; 10 *Jur. N. S.* 81; 9 *L. T. N. S.* 558; 12 *W. R.* 289; 3 *N. R.* 264. *House of Lords.* — 11 *H. L. C.* 523; 35 *L. J. Ch.* 53; 11 *Jur. N. S.* 513; 12 *L. T. N. S.* 742; 13 *W. R.* 873; 6 *N. R.* 209.

SUIT for an injunction to restrain the infringement of a complicated stamp on leather cloth.

Held, by the V. C.: (1.) that the general similarity of the stamps was such as to render the one likely to be taken for the other; (2.) that the plaintiffs were not disentitled by the

fact that their stamp contained the words "*tanned patented*," although the stamp was usually applied to cloth neither tanned nor patented, since the statement was correct when first made, and no one could be deceived as to the tanning; (3.) that the plaintiffs were not disentitled by the fact that their stamp contained the words "*J. R. and C. P. Crockett, Manufacturers*," the plaintiffs being entitled to use the name of those to whose business they had succeeded; (4.) that the plaintiffs were not prevented from suing by the fact that there was another person in existence who might have, but had not, used the name "*Crockett;*" (5.) that persons who had been in Crockett's employ were justified in styling themselves "*late with Crockett*," in such a manner as not to produce deception (1 H. & M. 279); (6.) that an injunction must be granted, with costs, but without any damages or account (see 11 W. R. 933).

Held, by the L. C., that assuming the stamps to be similar, so that the one would be an infringement of the other, the plaintiffs were disentitled by reason of the misstatements contained in their stamp (4 De G., J. & S. 147), of which the principal were the false statement of "tanned patented" and the use of the words "*J. R. & C. P. Crockett, Manufacturers*," which was calculated to attribute the manufacture of the cloth to those persons individually, though the plaintiffs might have styled their cloth "*Crockett's Leather Cloth.*" Decision reversed, but without costs, on account of the defendants' disingenuous conduct.

Held, by the House of Lords: (1.) that the defendants' stamp was not so similar to the plaintiffs' as to be an infringement; (2.) that, if it had been, the plaintiffs would have been disentitled by their misrepresentations.

Held, further, by the L. C., that the stamps were not trademarks at all, but mere advertisements.

Per V. C. (1 H. & M. 290). "Every case must rest on its own circumstances; but the general principle is that one person shall not be allowed to proclaim his goods as the goods of another, and if it appear that the mark used does not indicate the plaintiff more than

a multitude of other persons (as in the case where 'Prize Medal' was the symbol), then a defendant who uses it does not bring himself within the prohibition."

Per L. C. (4 De G. J. & S. 141). "The mistake of buyers in the market, under which they, in fact, take the defendant's goods as the goods of the plaintiff, that is to say, imposition on the public, becomes the test of the property in the trade-mark having been invaded and injured, and not the ground on which the court rests its jurisdiction."

P. 142. "It is correct to say that there is no exclusive ownership of the symbols which constitute a trade-mark, apart from the use or application of them; but the word 'trade-mark' is the designation of these marks or symbols as and when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called property. The true principle, therefore, would seem to be, that the jurisdiction of the court in the protection given to trade-marks rests upon property; and that the court interferes by injunction, because that is the only mode by which property of this description can be effectually protected."

P. 144. "It is true that a name or the style of a firm may by long usage become a mere trade-mark, and cease to convey any representation as to the fact of the person who makes, or the place of manufacture; but where any symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion which is false, I think no property can be claimed in it, or, in other words, the exclusive use of it cannot be maintained."

P. 148. "I cannot receive it as a rule, either of morality or equity, that a plaintiff is not answerable for a falsehood, because it may be so gross and palpable as that no one is likely to be deceived by it. If there be a wilful false statement, I will not stop to inquire whether it be too gross to mislead."

Per Lord Cranworth (11 H. L. C. 533). "The right which a manufacturer has in his trade-mark is the exclusive right to use it for the purpose of indicating where, or by whom, or at what manufactory, the article to which it is affixed was manufactured."

"But I further think that the right to a trade-mark may, in general, treating it as property, or as an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be

lawfully used by the purchaser. Difficulties, however, may arise where the trade-mark consists merely of the name of the manufacturer."

P. 535. "No general rule can be laid down as to what is or is not a mere colorable variation. All that can be done is to ascertain in every case, as it occurs, whether there is such a resemblance as to deceive a purchaser using ordinary caution."

Per Lord Kingsdown (p. 538). "A man may mark his own manufacture, either by his name, or by using for the purpose any symbol or emblem, however unmeaning in itself; and if such symbol or emblem comes by use to be recognized in trade as the mark of the goods of a particular person, no other trader has a right to stamp it upon his goods of a similar description."

P. 542. "If a manufacturing house uses the name of a firm, and stamps the name of its firm upon its goods, though the name of the firm no longer represents the same persons as at first, it is no fraud upon the public."

P. 544. "If the trade-mark represents the article as protected by patent, when in fact it is not so protected, I cannot think that it can make any difference whether the protection never existed or has ceased to exist."

"Though a man may have a property in a trade-mark, in the sense of having a right to exclude any other trader from the use of it in selling the same description of goods, it does not follow that he can in all cases give another person a right to use it, or to use his name."[1]

[1] The cases having a bearing upon the question whether the use of words importing that an article is patented when it is not were reviewed by Judge Cadwallader in *Cons. Fruit Jar Co.* v. *Dorflinger*, **444**, as follows: —

"In cases prior to 1863, before English vice-chancellors, the authority of *Sykes* v. *Sykes* could not be disregarded; and there was great hesitation in holding directly that a trade-mark representing an article as patented, when in fact it was not securely protected by a patent, was invalid in equity. Thus Vice-Chancellor Wood, afterwards Lord Hatherley, in 1853, intimated an opinion that the trade-mark would be invalid where no patent had ever existed; but afterwards, in the same year, when considering the case of a patent which had expired, suggested some qualification of the general doctrine. But such doubts or hesitations were removed in England by the case of *The Leather Cloth Co.* v. *The American Leather Cloth Co.*, in the House of Lords in 1865, affirming a decree made by Lord Chancellor Westbury, in 1863. In this case Lord Kingsdown said: 'If a trade-mark represents an article as *protected by a patent*, when in fact it is *not so protected*, it seems to me that such a statement *primâ facie* amounts to a misrepresentation of an important fact, which would disentitle the owner of the trade-mark to relief in

224. The Leather Cloth Co. (Limited) *v.* Hirschfeld. (2.)

July 16, 1863. *Wood, V. C.* — 1 *H. & M.* 295; 11 *W. R.* 933.

THE defendant having been directed to account for all goods sold by him impressed with a particular mark:

Held, that he was compellable to disclose the names of all persons to whom he had sold goods so marked, and that if he could not give such information precisely, he might then, and then only, be required to disclose the names of all customers to whom he had sold goods which he would not positively swear to have been unmarked.

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225. Williams *v.* Spence.

July, 1863. *N. Y. Super. Ct.: Monell, J.* — 25 *How. Pr.* 366; *R. Cox*, 305.

THE plaintiff being a manufacturer of soap, which he sold under the name of "*Genuine Yankee Soap*," the defendant sold other soap under the same name, and in boxes, and with labels, hand-bills, etc., only colorably differing from the plaintiff's.

On motion by the plaintiff, injunction granted to restrain the defendant from infringing the plaintiff's rights.

a court of equity against any one who pirated it;' and added, that he would have great difficulty in assenting to the distinction suggested by Vice-Chancellor Wood, in the case which had been cited. Lord Kingsdown here succintly restated the opinion of Lord Westbury, in the Court of Chancery; and Lord Westbury adhered to it in the Court of Appeal.

"An exception to this rule of decision had been previously, and has been since, recognized in the case of an article, such as *patent leather*, or *patent thread*, whose designation of this kind is in constant use, though no one supposes that it is thereby intended to convey the impression that the subject is protected by any patent. So after a patented privilege has long since expired, such a designation may have become a general or special word of art. But such exceptions only confirm the rule of decision in ordinary cases."

See *Pidding* v. *How*, 60.

226. Braham *v.* Bustard.

August 3, 1863. *Wood, V. C.* — 1 *H. & M.* 447; 9 *L. T. N. S.* 199; 11 *W. R.* 1061; 2 *N. R.* 572.

THE plaintiffs being the manufacturers of a kind of soap which they sold under the name of "*Excelsior White Soft Soap*," the defendants began to sell another soap of their own make as "*Bustard and Co.'s Excelsior White Soft Soap.*"

On motion by the plaintiffs:

Held, (1.) that the word "*Excelsior*" was a fancy name and not a mere word of quality, as "*superfine*" or "*superior;*" (2.) that the plaintiffs' right to an injunction was not affected by the fact that the defendants had never used the word except in conjunction with their firm name, or by the fact that the plaintiffs had recently adopted a distinctive trade-mark; (3.) and that an injunction must be granted to restrain the defendants from selling their soap under the name given by the plaintiffs to their article.

"The additional trade-mark adopted by the plaintiffs in March last does not, to my mind, affect the question. The name 'Conveyance Company' (in *Knott* v. *Morgan*) was not a trade-mark, and I cannot hold it to be any justification for a defendant to say 'the plaintiff has two ways of identifying his goods, and I have only stolen one of them.'"

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227. Wotherspoon & Co. *v.* Gray & Co.

November 10, 1863. *Ct. of Session.* — *Ct. of Sess. Cas. 3d Ser. II.* 38.

THE plaintiffs being manufacturers of confectionery, who sold lozenges of their make in packets bearing the words "*Wotherspoon's Machine-made Cinnamon* (or Clove, Musk, Rose, etc.) *Victoria Lozenges*" on the front, and announcements as to their process of manufacture, etc., on the side, the defendants sold lozenges of their own in packets with the words "*Cinnamon Victoria Lozenges*" on the front, and

"*John Gray & Co.'s Machine-made Victoria Lozenges*" on the side.

Interdict to restrain the defendants from using the name "*Victoria*," and from imitating the plaintiffs' announcements, refused, on the ground that the name "*Victoria*" was in common use, and that, in any case, the name "*Gray & Co.'s Victoria Lozenges*" was distinguishable from "*Wotherspoon's Victoria Lozenges*," and that the defendants' wrappers and announcements thereon were essentially different from the plaintiffs'.

228. Kinahan *v.* Bolton.

December 10, 1863. *Brady, C. of I.* — 15 *Ir. Ch.* 75.

THE petitioners being makers of whiskey, which they sold in bottles, etc., labelled with the letters "*L. L.*" and a coronet, the respondent sold whiskey in bottles, etc., labelled with the same letters.

On petition, injunction granted to restrain the respondent from selling whiskey marked with those letters; and

Held, that acquiescence in the infringement of the trade-mark was not established by proof of the publication of advertisements which, though in some instances they infringed the petitioners' rights, did not do so uniformly or continuously.

"In such suits, in order to found the jurisdiction of this court, there must be established, first, the existence of the trade-mark; next, the fact of an imitation, whether a direct imitation, or one with such variations that the court must regard them as merely colorable; and, thirdly, the fact that the imitations were made without license, or anything that this court could regard as acquiescence in their use."

229. Ponsardin *v.* Peto; Ex parte Uzielli.

December 10, 1863. *Romilly, M. R.* — 33 *Beav.* 642; 33 *L. J. Ch.* 371; 10 *Jur. N. S.* 6; 9 *L. T. N. S.* 567; 12 *W. R.* 198; 3 *N. R.* 237.

AN injunction having been granted to restrain a dock company from parting with wine spuriously marked with the plaintiffs' mark:

On motion by a third person who had advanced money on the dock-warrants, in ignorance of the spuriousness of the marks, for the wine to be delivered to him :

Held, that the applicant was entitled to have the wine delivered to him, on its being re-corked, but that he must pay the costs of the application.

"The dock company would have the first charge on the wine for their expenses, Mr. Uzielli the second for his advances and his costs, and the plaintiffs the third for their costs of suit."

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230. Browne *v.* Freeman. (1.)

January 11, July 12, 1864. *Wood, V. C.* — 12 *W. R.* 305; 4 *N. R.* 476.

THE plaintiff being the inventor of a medicine to which he gave the name of "*Chlorodyne*," and which he sold in bottles labelled with the words "*Dr. J. Collis Browne's Chlorodyne*," and "*The only Genuine Chlorodyne*," the defendant began to sell a preparation as "*Chlorodyne*," and afterwards as "*The Original Chlorodyne*," the plaintiff having in the mean time procured the dismissal with costs of a bill which he had filed to restrain the defendant from using the name "*Chlorodyne*."

On motion for an injunction (12 W. R.), and at the hearing of the cause (4 N. R.) :

Held, (1.) that although the word "*Chlorodyne*" might originally have been protected as a fancy name, the plaintiff had abandoned all claim to an exclusive right in it by dismissing the suit which he had commenced to restrain the use of it; and (2.) that the plaintiff was not entitled to an injunction to restrain the defendant from styling his "*The Original Chlorodyne*," since there was no evidence that the assumption of that title by him caused his medicine to be supposed to be of the plaintiff's manufacture. No costs given.[1]

[1] See *Cocks* v. *Chandler*, 351, where the word "*original*" was protected.

231. Taylor *v.* Bemis.

January, 1864. *U. S. C. C. N. Dt. of Ill.: Drummond, J.* — 4 *Biss.* 406.

SUIT by execution creditors of H. V. Bemis, one of the partners in the firm of "*Downer, Bemis & Co.*," brewers, for a sale of the defendant's interest in the name or trade-mark of Downer, Bemis & Co.

Held, that such sale must be refused, on the ground that the defendant's interest in the mark was merely a right to a part of it, and that such right was of no value apart from the connection of the partnership business.

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232. Phalon *v.* Wright.

1864. *Phila. C. P.: Thompson, P. J.* — 5 *Phila.* 464; *R. Cox*, 307.

THE plaintiff being the maker of a perfume, which he sold under the name of "*Night Blooming Cereus*," the defendants sold another perfume under the name of "*Wright's Night Blooming Cereus.*"

On motion by the plaintiff for an injunction to restrain the defendants from using the name:

Held, (1.) that the perfume not being made from that flower, the use of the title was a misrepresentation; (2.) that, if the perfume had been made from the flower, the name would have been merely descriptive of the origin of the perfume, and therefore could not be a valid trade-mark; (3.) that the labels were not similar, and that the defendants' name appeared prominently on theirs; (4.) and that the injunction must be refused.

"The trade-mark, to be capable of an exclusive use, must be such as will identify the article to which it is affixed as that of the person naming it, and distinguish it from others. A word which is the name of the article, or indicates its quality, cannot be so appropriated. Every one has the right to manufacture the same article and to call it by its name or descriptive character."[1]

[1] See *Pidding* v. *How*, 60.

233. McCardel *v.* Peck.

March, 1864. *N. Y. Sup. Ct.* — 28 *How. Pr.* 120; *R. Cox*, 312.

THE "*McCardel House*," having been established and carried on by W. Hitchcock for the benefit of the plaintiff's husband, the plaintiff, after the death of her husband, required the defendant, who had purchased the business from W. Hitchcock, to discontinue the use of the name.

Injunction granted to restrain the defendant from using the name, it having been used by W. Hitchcock and the defendant by virtue of a license, which was capable of being, and had been revoked; and an attachment for contempt issued against the defendant, who had violated the injunction by continuing to use the name.[1]

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234. McAndrew *v.* Bassett.

March 4, May 7, 1864. *Wood, V. C.* — 33 *L. J. Ch.* 561; 10 *Jur. N. S.* 492; 10 *L. T. N. S.* 65, 442; 4 *N. R.* 12. *Lord Westbury, C.* — 4 *De G., J. & S.* 380; 33 *L. J. Ch.* 566; 10 *Jur. N. S.* 550; 10 *L. T. N. S.* 442; 12 *W. R.* 777; 4 *N. R.* 123.

THE plaintiffs having recently begun to sell liquorice of their manufacture stamped with the word "*Anatolia*," the defendants began to sell other liquorice under the same stamp.

Suit for an injunction to restrain the defendants from so doing.

Held, (1.) that the word "*Anatolia*" was a good trade-mark on liquorice, being used as a fancy name, and not as indicative of the origin of the liquorice; (2.) that the plaintiffs had acquired an exclusive right therein, though they had only used it for about six weeks; (3.) (10 Jur. N. S. 495) that it was not a case in which an account need be directed; (4.) that the defendants must pay costs, although they had offered to submit, since they had not offered to pay the costs of the proceedings up to the time of the offer.

[1] See *Howard* v. *Henriques*, 108.

Per L. C. (p. 384). "An element of the right to the property in a trade-mark may be represented as being the fact of the article being in the market as a vendible article, with that stamp or trade-mark, at the time when the defendants imitate it. The essential ingredients for constituting an infringement of that right probably would be found to be no other than these: First, that the mark has been applied by the plaintiffs properly, that is to say, that they have not copied any other person's mark, and that the mark does not involve any false representation; secondly, that the article so marked is actually a vendible article in the market; and thirdly, that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description."

P. 386. "Property in the word (Anatolia) for all purposes cannot exist; but property in that word, as applied by way of stamp upon a particular vendible article, as a stick of liquorice, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation whereby the stamp gets currency as an indication of superior quality, or of some other circumstance which renders the article so stamped acceptable to the public." [1]

235. Moet *v.* Couston.

May 3, 1864. *Romilly, M. R.* — 33 *Beav.* 578; 10 *L. T. N. S.* 395; 4 *N. R.* 86.

THE defendants having purchased and resold in England a quantity of the plaintiffs' champagne, marked as "*Moet's*," the plaintiffs filed a bill for an injunction and an account, and after answer the defendants offered to submit to an injunction, each party paying his own costs.

Held, that the injunction must be granted, but no account and no costs, the plaintiffs having asked for an account, to which they were not entitled.

10 L. T. N. S. 396. "If a man manufactures goods himself, and puts upon them the trade-mark of another, though he may not know

[1] The decision in this case that the word "*Anatolia*" was a valid trade-mark rests squarely upon the assumption that as used it was not geographical.

to whom that mark belongs, he must at least know that he has himself no right to the mark. That knowledge makes him liable to account for the profits he may have realized by his conduct. But if a man buys goods from a third party, believing them to be genuine, while in fact they are spurious, it is not until he has been told that they are so that he can be considered to be guilty of any fraud, or to be liable to render any account."

33 Beav. 581. "If the defendants had offered to submit to the injunction and to pay the costs, and the plaintiffs had afterwards brought the case to a hearing, I should have given the defendants their costs subsequent to that offer."

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236. The Colonial Life Assurance Company *v.* The Home and Colonial Assurance Company (Limited).

May 9, 1864. *Romilly, M. R.*— 33 *Beav.* 548; 33 *L. J. Ch.* 741; 10 *Jur. N. S.* 967; 10 *L. T. N. S.* 448; 12 *W. R.* 783; 4 *N. R.* 129.

MOTION for an injunction to restrain the defendants from using their name (as above), or any other name resembling that of the plaintiffs, refused, on the ground that the real object of the motion was to obtain a monopoly of the word "*Colonial.*"

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237. Edgington *v.* Edgington.

November 7, 1864. *Wood, V. C.* — 10 *L. T. N. S.* 299.

INJUNCTION to restrain the defendant from falsely representing himself to be carrying on the plaintiff's business, or to be carrying on business in connection with or in succession to him, refused, but without costs; the only case in which an attempt at personation was proved being a case in which the defendant had opened a letter addressed to the plaintiff, and had attempted, but without success, to obtain the custom thereby offered to the plaintiff.

238. Johnson *v.* Helleley.

November 8, December 21, 1864. *Romilly, M. R.* — 34 *Beav.* 63; 34 *L. J. Ch.* 32; 10 *Jur. N. S.* 1041; 11 *L. T. N. S.* 295; 13 *W. R.* 38; 5 *N. R.* 4. *Knight Bruce and Turner, L. JJ.* — 2 *De G., J. & S.* 446; 34 *L. J. Ch.* 179; 11 *L. T. N. S.* 581; 13 *W. R.* 220; 5 *N. R.* 211.

PARTNERSHIP suit. The good-will of a partnership business carried on under the name of "*Samuel Johnson & Sons*" having been directed to be sold, upon the death of one of the partners, in a suit commenced by the surviving partner for the purpose of having the business wound up, and the chief clerk proposing to give the purchaser the exclusive right to hold himself out as the successor of the firm of "*Samuel Johnson & Sons*:"

Held, that the surviving partner retained the right to set up a similar business in the old neighborhood, and that the advertisements and particulars of sale must give purchasers notice to that effect.

239. Hunt *v.* Maniere.

December 8, 1864; January 28, 1865. *Romilly, M. R.* — 34 *Beav.* 157; 34 *L. J. Ch.* 142; 11 *Jur. N. S.* 28; 11 *L. T. N. S.* 469; 13 *W. R.* 212; 5 *N. R.* 181. *Knight Bruce and Turner, L. JJ.* — 34 *L. J. Ch.* 144; 11 *Jur. N. S.* 73; 11 *L. T. N. S.* 723; 13 *W. R.* 363; 5 *N. R.* 295.

THE plaintiffs being wharfingers, with whom spurious champagne, marked with a counterfeit brand of "*Veuve Clicquot, Ponsardin & Co.*," was warehoused, and who had notice of the spurious mark and of the intention of the injured party to apply for an injunction, refused to deliver up the wine to the indorsee of the dock warrants, who thereupon commenced an action for damages against them.

Suit for an injunction to restrain the action.

Held, that the wharfingers were justified in acting as they had done, and that the injunction must be granted.

240. Binninger *v.* Wattles.

January, 1865. *N. Y. C. P.: Brady, J.* — 28 *How. Pr.* 206; *R. Cox,* 318.

THE plaintiffs being vendors of gin, which they sold in bottles labelled with the words "*Old London Dock Gin*," the defendant sold other gin similarly labelled.

On motion by the defendant to dissolve an injunction which had been granted to restrain him from infringing the plaintiffs' rights:

Held, (1.) that the name "*Old London Dock Gin*" was descriptive of the article, and therefore could not be exclusively appropriated; and further, that any person of the same name could not be prevented from selling "*Binninger's Old London Dock Gin;*" (2.) but that the motion must be refused, on the ground that the defendant's labels were intended and calculated to deceive.

241. Orr Ewing *v.* Chooneeloll Mullick.

January 16, 1865. *Bengal High Ct.: Morgan, J.* — *Cor.* 150.

THE plaintiffs being a Glasgow firm of manufacturers of cotton goods, which they exported to India and sold there with certain trade-marks in the form of tickets affixed, the defendant, a dealer in the Burra Bazaar at Calcutta, sold goods there similarly marked.

On motion by the plaintiffs, injunction granted to restrain the defendant from so doing, notwithstanding that he had not himself affixed the spurious marks to his goods, but had purchased the goods so marked from the importers, and was, further, only proved to have sold goods spuriously marked on one occasion, and that to the plaintiffs' agent.[1]

[1] See *Orr* v. *Johnston*, 646.

242. Montague *v.* Moore.

March 1, 1865. *Wood, V. C.* — *Seton, 4th ed.* 238.

THE plaintiffs being the managers of the "*Christy's Minstrels*," the defendants, who had been members of their company, represented themselves to be "*The Christy's Minstrels.*"

On motion by the plaintiffs, injunction granted to restrain the defendants from representing themselves to be the successors or representatives of that company, and from representing the plaintiffs to have been connected with the defendants' company.[1]

243. Southorn *v.* Reynolds.

March 10, 1865. *Wood, V. C.* — 12 *L. T. N. S.* 75.

THE plaintiff being a manufacturer of "*Southorn's Broseley Pipes*," the defendant took into his employment a workman of that name and from that place, and sold pipes under the same name.

Suit for an injunction.

Held, that the plaintiff was entitled to an injunction to restrain the defendant from selling clay tobacco pipes in boxes, etc., labelled so as to indicate that they were manufactured by Southorn of Broseley, notwithstanding that the defendant had a workman of that name and from that place in his employ, and notwithstanding that the plaintiff's brother, who did not join in the suit, had an equal right to the use of the mark "Southorn, Broseley," with himself. Account also granted, and an inquiry as to damages.[2]

244. Harrison *v.* Taylor.

May 1, 1865. *Wood, V. C.* — 11 *Jur. N. S.* 408; 12 *L. T. N. S.* 339.

THE plaintiffs being manufacturers of mustard, which they sold with a label affixed, the conspicuous feature of which was the figure of an ox, the defendants sold other mustard with

[1] See *Christy* v. *Murphy*, **137**. [2] See *Burgess* v. *Burgess*, **117**.

a very similar label, but having their own name substituted for the plaintiffs'.

On motion by the plaintiffs, injunction granted to restrain the defendants from infringing their rights, notwithstanding that there was some evidence that a certain class of customers were in the habit of ordering "*Harrison's*" mustard, and not "*ox*" mustard, and although the plaintiffs had delayed commencing proceedings from August, 1863, till May, 1864.

But *Held*, that no account of profits before the filing of the bill could be given, on account of the plaintiffs' delay.

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245. Swift *v.* Dey.

May, 1865. *N. Y. Super. Ct.* — 4 *Robertson*, 611; *R. Cox*, 319.

An injunction having been granted to restrain the defendant from selling matches in boxes labelled in imitation of the plaintiff's, the defendant changed his labels, but, as the plaintiff thought, insufficiently.

Motion by the plaintiff for the committal of the defendant for contempt, refused, on the ground that the defendant's new label would not deceive ordinary purchasers.

Per Robertson, C. J. "It is the unwary, and not the wary, who are to be protected, as most likely to be taken in by the counterfeit."

Per McCunn, J. "The great principle laid down and applied in all the cases of trade-marks is, that if persons of ordinary understanding purchasing the article would be placed on their guard, and would be led to inquire whether they were being deceived by the article they were purchasing, that fact is sufficient for the court to refuse its interference."

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246. The Correspondent Newspaper Co. (Limited) *v.* Saunders.

June 1, 1865. *Wood, V. C.* — 11 *Jur. N. S.* 540; 12 *L. T. N. S.* 540; 13 *W. R.* 804.

The plaintiffs being a company which had been formed for the purpose of publishing a newspaper to be called *The Correspondent* (which paper had been registered at Stationers'

Hall on April 8, 1864, under 5 & 6 Vict. c. 45, but was not issued till May 3, 1865, when another entry was made on the register), the defendants registered a publication under the same title on March 3, 1865, and published the first number as "*The Public Correspondent*" on May 6, 1865.

Motion by the plaintiffs for an injunction to restrain the defendants from publishing any newspaper containing the word "Correspondent" refused, on the ground that (1.) the entry on the register was of no avail without actual publication; (2.) it was doubtful whether in any case registration would protect the title as being included in the copyright; (3.) the difference between the dates of the respective first publications was so slight as to render the exclusive right of the plaintiffs in the title, by way of trade-mark, too doubtful for an interlocutory injunction to be granted; (4.) the plaintiffs had delayed giving the defendants notice of their claim till they had brought out their own paper, eight days after they became aware of the defendants' intentions.

247. Glenny *v.* Smith.

July 18, 1865. *Kindersley, V. C.* — 2 *Drew. & Sm.* 476; 11 *Jur. N. S.* 964; 13 *L. T. N. S.* 11; 13 *W. R.* 1032; 6 *N. R.* 363.

THE plaintiffs being Thresher, Glenny & Co., of 152 Strand, the defendant, one of their employees, left their service and opened a shop in Oxford Street, where he placed his own name over the door, but on the brass plates and awning the words "*from Thresher & Glenny*," the word "*from*" being in very small letters.

Injunction granted to restrain the defendant from using the name of the plaintiffs' firm in any way so as to deceive; and

Held, that the fact that the defendant had cautioned a shopman not to permit deception was evidence against the defendant, as showing that he doubted the propriety of his use of the name.

"There is no question but that if a man, having been in the employment of a firm of reputation, sets up in business for himself, he

has a right in any way in which he thinks fit, provided it is done in accordance with the rule I have stated (*i. e.* so as not to deceive), to inform the public that he has been in such employment, and in that way to appropriate to himself some of the benefit arising from the reputation of his former employers. But in so doing he must take especial care that it is done in such a way as not to mislead the public to the detriment of his former employers."

"It does not signify, for the purpose of the plaintiffs' right to relief, whether the defendant has acted with a fraudulent intention or not; it is enough if, even without any unfair intention, he has done that which is calculated to mislead the public. . . . . And it is not the question whether the public generally, or even a majority of the public, is likely to be misled; but whether the unwary, the heedless, the incautious portion of the public would be likely to be misled."

248. Banks *v.* Gibson.

July 21, 1865. *Romilly, M. R.* — 34 *Beav.* 566; 34 *L. J. Ch.* 591; 11 *Jur. N. S.* 680; 13 *W. R.* 1012; 6 *N. R.* 373.

THE plaintiff's husband and the defendant entered into a partnership for fifteen years, as pencil-makers, under the firm name of "*Banks & Co.;*" at the end of ten years the plaintiff's husband died, and the plaintiff replaced him in the partnership for four years longer, when the partnership was dissolved and the assets were divided, but no arrangement was come to with respect to the firm name. The plaintiff continued to carry on the same business in the same town, but not on the old premises, and the defendant continued to do so on the old premises, each under the old name of "*Banks & Co.*"

Injunction to restrain the defendant from using the name of "*Banks & Co.*," or "*Banks*," in his business, refused, with costs.

"The name or style of the firm of 'Banks & Co.,' in which the defendant had been engaged for a period of fourteen years, was an asset of the partnership, and if the whole concern and the good-will of a business have been sold, the name, as a trade-mark, would have been sold with it. If, by arrangement, one partner takes the whole

concern, there must be a valuation of the whole, including the name or style of the firm. But if the partners merely divide the other partnership assets, then each is at liberty to use the name just as they did before. It is the same as if two persons, who alone carried on the business of 'Child & Co.,' thought fit to separate, each would be entitled to use the name by which they carried on their business."

249. Derringer *v.* Plate.

October, 1865. *Cal. Sup. Ct.* — 29 *Cal.* 292; *R. Cox*, 324.

THE plaintiff being a Philadelphia pistol-maker, who marked his goods "*Derringer, Philadel.*," the defendant, a Californian, sold other pistols similarly marked.

Action at law. Demurrer overruled, and *Held*, (1.) that the right of property in a trade-mark was not limited in its enjoyment by territorial bounds, so that a person owning a mark in one American state owned it in all, and, therefore, that the plaintiff could be protected in California; (2.) that the plaintiff's right of property in his trade-mark could be protected at common law, though he had not complied with the requirements of the California Statute of 1863.

250. Bradley *v.* Norton.

November, 1865. *Conn. Sup. Ct.* — 33 *Conn.* 157; *R. Cox*, 331.

THE plaintiff being a manufacturer, under an exclusive license from the inventor and patentee, of an agricultural compost, which he sold under the name of "Coe's Superphosphate of Lime," the defendants sold an article under the same name.

Injunction granted to restrain the defendants from so doing.

251. Beard *v.* Turner.

November 8, 1865. *Wood, V. C.* — 13 *L. T. N. S.* 746.

THE plaintiffs being manufacturers of needles, which they sold in packets labelled with a trade-mark consisting of a

crest of an elephant's head on a coronet, and the words "*Kirby's ne plus ultra*," the whole embossed in white on a blue ground, the defendant sold other needles with a label bearing a general resemblance to the plaintiffs'.

Suit for an injunction to restrain the defendant from infringing the plaintiffs' rights.

Held, (1.) that the words "*ne plus ultra*" and the white device embossed on blue were proved to be common to the trade; (2.) that a trade-mark might consist of a crest, but that the defendant, having used a lion's head instead of an elephant's head, and having placed "*Turner & Co.*" in place of "*Kirby & Co.*," the other elements being common, not only to the parties, but to the trade generally, had not adopted a mark likely to deceive; (3.) that it was an element strongly in favor of the defendant's *bona fides* that he had exhibited his needles and labels side by side with the plaintiffs' at the Exhibition of 1862; (4.) that the injunction could not be granted; (5.) that, even if relief could have been granted, the plaintiffs, having lain by for two years after they became aware of what the defendant was doing, could have had no account or costs, by reason of that delay.

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252. The Leather Cloth Company *v.* Hirschfeld. (3.)

November 15, 1865. *Wood, V. C.* — *L. R.* 1 *Eq.* 299; 13 *L. T. N. S.* 427; 14 *W. R.* 78.

THE plaintiffs having obtained an injunction to restrain the infringement of their trade-mark, and an inquiry as to damages, failed to prove special damage, but claimed the amount of profits which they would have made if they had sold the amount of cloth which the defendant had sold under their mark.

On adjourned summons: *Held*, that the burden lay on the plaintiffs to prove special damage by loss of custom or otherwise, and that it could not be assumed that the same quantity would have been bought of the better goods at the higher price as had been bought of the inferior goods at the lower

price, and therefore that in the case in question no damage could be said to have been suffered.

253. Barnett *v.* Leuchars.

December 4, 1865. *Stuart, V. C.* — 13 *L. T. N. S.* 495; 14 *W. R.* 166.

THE plaintiffs being inventors and manufacturers of toy fireworks called "*Pharaoh's Serpents*," the defendant sold similar fireworks, and by the request of his customers, and without making any false representations, placed them in old boxes bearing the plaintiffs' labels.

Suit for an injunction.

Held, (1.) that the injunction must be granted, notwithstanding that the defendant had placed the fireworks in those boxes only at the request of customers, and without making any false representations; (2.) but that no costs could be given, the defendant having acted *bonâ fide*, and having discontinued the objectionable practice immediately on the plaintiffs' serving on him their notice of motion.

"According to the principle which governs these cases, an owner has an exclusive right to a trade-mark or label, and that right is to be regarded as his property."

254. Williams *v.* Osborne.

December 8, 1865. *Wood, V. C.* — 13 *L. T. N. S.* 498.

THE plaintiffs having purchased the perfumery business formerly carried on by Robert Hendrie, deceased, from his executors, the defendants, who had been long in Hendrie's employ, set up business in partnership, and used labels and made representations which the plaintiffs considered to amount to an infringement of their rights.

Suit for an injunction to restrain the defendants from selling their goods as Hendrie's, or representing themselves as his successors in business.

Held, (1.) that, having been long in his service, they were

justified in placing on their shop their names, with the words, "*from the late R. Hendrie*," and in styling themselves on placards "*managers and manufacturers to the late R. Hendrie*," and using Hendrie's name on their labels, in conjunction with their own, if they only used the name fairly and without misstatements; (2.) that no case of fraudulent intention was proved, though if the defendants had continued to act in a certain way after it had been pointed out to them that the public were deceived, what was not at first fraudulent would have become so; (3.) that the bill must be dismissed, and having been filed too hastily, with costs.

255. Chubb *v.* Griffiths.

December 15, 1865. *Romilly, M. R.* — 35 *Beav.* 127.

THE plaintiff being a manufacturer of iron safes, the defendant, being still an infant, sold spurious second-hand iron safes marked with the plaintiff's trade-mark.

Suit for an injunction. *Held*, that, notwithstanding his infancy, the defendant must pay the costs of the suit, although he submitted at once, and alleged that he had acted in ignorance.

256. Seixo *v.* Provezende.

January 22, 1866. *Lord Cranworth, C.* — *L. R.* 1 *Ch.* 192; 12 *Jur. N. S.* 215; 14 *L. T. N. S.* 314; 14 *W. R.* 357.

THE plaintiff being a Portuguese wine-grower, who sold his wine in casks stamped with a crown and eagle and "*B. S.*" on the head of the cask, and a crown "*Seixo*," and a date at the bunghole, from which the wine had acquired the name of "*Crown Seixo*" wine, the defendants sold their wine in casks stamped on the head and at the bunghole with a crown, "*C. B.*," "*Seixo de Cima*," and "*1861*."

Injunction granted to restrain the defendants from using the brand of a crown and "*Seixo*," or any other marks likely to cause their wine to be mistaken for the "*Crown Seixo*"

wine, although the marks were not similar when seen side by side.

"In order to entitle a party to relief it is by no means necessary that there should be absolute identity. What degree of resemblance is necessary is, from the nature of things, a matter incapable of definition *à priori*. All that courts of justice can do is to say that no trader can adopt a trade-mark so resembling that of a rival as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled. It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use. If a purchaser, looking at the article offered to him, would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the court considers the use of such a mark to be fraudulent. But I go further. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as the actual copy of his device."

257. Ainsworth *v.* Walmsley.

January 24, 1866. *Wood, V. C.* — *L. R.* 1 *Eq.* 518; 35 *L. J. Ch.* 352; 12 *Jur. N. S.* 205; 14 *L. T. N. S.* 220; 14 *W. R.* 363.

THE plaintiff's thread being known in the market by the name "*Ainsworth's Thread*," and marked with a graduated scale of numbers, the defendants bought thread from a firm of thread-winders, who were known to wind the plaintiff's thread, and sold this thread, bearing the winder's name, but invoiced under the plaintiff's system of numbers, and accompanied by an assurance that it was of the plaintiff's make, to a retail dealer, who relabelled it with the plaintiff's name and sold it as his. The thread turned out not to be the plaintiff's, but inferior to it.

Suit for an injunction to restrain the defendants from selling thread, not being the plaintiff's, as his.

Held, that the defendants having sold the thread to the retail dealer with the name of the winders on it, and not that of the plaintiff, an injunction could not be granted against them; but that their conduct in making the representations, and especially in the use of the plaintiff's system of numbers, was so improper as to disentitle them to costs.

"If a manufacturer does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron; but when he has appropriated a mark to a particular species of goods, and caused his goods to circulate with this mark upon them, the court has said that no one shall be at liberty to defraud that man by using that mark, and passing off goods of his manufacture as being the goods of the owner of that mark. And inasmuch as the court protects the owner of the mark, he is entitled to authorize another, when he hands over his business to him, to place that mark on his goods; that is a right which, being protected by this court, may be disposed of for value, may be bought and sold, and is, therefore, in that sense of the word, property."

"Is not a man's name as strong an instance of trade-mark as can be suggested? — subject only to this inconvenience, that if a Mr. Jones or a Mr. Brown relies on his name, he may find it a very inadequate security, because there may be several other manufacturers of the same name."

258. Standish *v.* Whitwell.

March 9, 1866. *Wood, V. C.* — 14 *W. R.* 512.

THE plaintiffs carrying on business as "*The Eagle Coal and Iron Company*," and having long stamped their iron with the figure of an eagle, from which it had acquired the name of "*eagle iron*," the defendants began to sell their iron stamped with an "*eagle brand*."

On motion by the plaintiffs:

Held, (1.) that an injunction must be granted to restrain the defendants from stamping the figure of an eagle on their iron, notwithstanding that they alleged it to be their family

crest; (2.) that the costs of an affidavit, making charges of fraud which were not substantiated, must be disallowed.

259. Ainsworth *v.* Bentley.

March 16, 1866. *Wood, V. C.* — 14 *W. R.* 630.

THE plaintiff having purchased from the defendant "*Bentley's Miscellany*," on which occasion the defendant covenanted not to publish, etc., any periodical of a like nature, the defendant began to publish another periodical called "*Temple Bar*," with his name on the cover.

On motion by the plaintiff:

Held, that an injunction must be granted to restrain the defendant from publishing the magazine with his name on it, but that he could not be restrained from publishing the magazine without his name appearing in connection with it.[1]

260. Dickson *v.* McMaster & Co.

May 28, 1866. *Brady, C. of I.* — 18 *Ir. Jur.* 202.

PARTNERSHIP suit.

Held, that upon the true construction of a partnership agreement, which provided for accounts being taken of the partnership "stock in trade, goods, chattels, and effects," the continuing partner in the firms of "Dunbar, McMaster & Co.," and "Dunbar, Dickson & Co.," who was the owner of the premises on which the partnership business was carried on, and who was entitled, on the termination of the partnership, to take over the shares of the retiring partners at a valuation, was also entitled to take over the good-will, trade name, and trade-marks of those firms, without further payment on a separate valuation of those particulars (those particulars being held not to be included in the term "stock in trade, goods, chattels, and effects"), but that he was not entitled to use the names of the retiring partners.

[1] See *Hogg* v. *Kirby*, 10.

261. Hudson *v.* Bennett.

June 30, 1866. *Stuart, V. C.* — 12 *Jur. N. S.* 519; 14 *L. T. N. S.* 698; 14 *W. R.* 911.

THE plaintiffs having obtained an interim injunction to restrain the defendant from infringing their trade-mark on beer, the defendant offered to pay the costs of the suit, as between solicitor and client, and to give an undertaking in the terms of the first part of the prayer of the bill, amounting to an offer of all material relief, but refused to insert an apology in the newspapers.

The plaintiffs having, nevertheless, brought the case to a hearing:

Held, that, although the perpetual injunction must be granted, no costs could be given, the plaintiffs having refused the defendant's offer at their peril in respect of costs.

262. Green *v.* Shepherd.

July 4, 1866. *Ct. of Session.* — *Ct. of Sess. Cas. 3d Ser. IV.* 1028; 2 *Scot. L. Rep.* 168.

THE plaintiff being an English chemist and manufacturer of washing powder, the defendant, a Scotch manufacturer of the same article, sold his goods under the plaintiff's trade-mark.

Action for damages and an interdict. Motion by the plaintiff for an interim interdict refused, on the ground that the summons was framed on the footing that the plaintiff had no case for an interim interdict, but undertook to prove his right by recovering damages, as a preliminary to obtaining an interdict.

263. Sherwood *v.* Andrews.

August, 1866. *Chicago Super. Ct.* — 5 *Am. L. Reg. N. S.* 588.

THE plaintiffs being manufacturers of "Holbrook's School Apparatus" (that apparatus having been first manufactured

by J. Holbrook, afterwards by his son, D. Holbrook, and next by a company organized by D. Holbrook, and called "*The Holbrook School Apparatus Company*," which company had recently been dissolved by the plaintiffs, the sole stockholders therein), the defendants began to sell another apparatus under the same name.

Injunction to restrain the defendants from using the name "*Holbrook*" or "*Holbrook's*" on such apparatus refused; and *Held*, (1.) that the name, having been used by several persons other than the plaintiffs or their predecessors, had become generic and descriptive and incapable of protection as a trade-mark; (2.) that even if the company had had a valid right in the mark, it did not pass to the plaintiffs as being the stockholders at the time of the dissolution; (3.) that a trade-mark should not be protected in the hands of an executor, assignee, or other person claiming through its first adopter, unless such person added to it words indicative of the relation between himself and the first adopter of the mark, since otherwise a fraud would be committed on the public.[1]

264. Maxwell *v.* Hogg.

November 8, 1866; January 15, 1867. *Stuart C. V.* — 12 *Jur. N. S.* 310; 15 *L. T. N. S.* 204; 15 *W. R.* 84. *Turner and Cairns, L. JJ.* — *L. R.* 2 *Ch.* 307; 36 *L. J. Ch.* 433; 16 *L. T. N. S.* 130; 15 *W. R.* 467.

THE defendants having, in 1863, registered, under the Copyright Acts, the name "*Belgravia*," as the title of a new magazine, but not having published the magazine, the plaintiff registered the same name in 1866, and went to considerable expense in respect of his intended publication. The defendants, having discovered this in August, hastened on their own publication, and announced it on September 24, and published it on the 25th. The plaintiff's magazine was brought out in October.

Injunction to restrain the defendants from using the name refused, on the ground that the name had been first used on

[1] See *Singer Man. Co.* v. *Wilson*, 477.

an actual publication by the defendants, and that the expense which the plaintiff had been at in the preparation of the work, advertisements, etc., could not give him an exclusive right in the name.

Per Turner, L. J. "It seems to me that there is a great distinction between the case of advertisement followed by publication and a case resting upon advertisement only. In the case of advertisement followed by publication, the party publishing has given something to the world, and there is some consideration for the world's giving him a right; but in the case of mere advertisement he has neither given, nor come under any obligation to give, anything to the world, so that there is a total want of consideration for the right which he claims."

Per Cairns, L. J. (p. 310). "It always appeared to me that *Clark* v. *Freeman* might have been decided in favor of the plaintiff, on the ground that he had a property in his own name."

P. 314. "All the definitions which have been given in this court of the nature of the right to protection in the case of trade-marks seem to me to be opposed to the idea that protection can be given where there has been no sale, or offering for sale, of the articles to which the name is to be attached."

P. 315. "I am prepared to hold, without any hesitation, that the mere intention, and the declaration of intention, to use a name will not create any property in that name; and to hold also that there can be no protection in this court for the intended name during the course of manufacture of the article which is to bear that name." [1]

265. Hogg *v.* Maxwell.

November 8, 1866; January 15, 1867. *Stuart, V. C.* — 12 *Jur. N. S.* 916; 15 *L. T. N. S.* 204; 15 *W. R.* 84. *Turner and Cairns, L. JJ.* — *L. R.* 2 *Ch.* 316; 36 *L. J. Ch.* 437; 16 *L. T. N. S.* 133; 15 *W. R.* 470.

Cross suit by the defendants in *Maxwell* v. *Hogg*.

Injunction to restrain the plaintiff in that suit from using the name "*Belgravia*" as the title of a magazine refused, on the ground that the prior registration of the name under the Copyright Acts by the plaintiffs in the cross suit, without actual publication, gave them no exclusive right in the name;

[1] See *Hogg* v. *Kirby*, 10.

and, further, that they could not be protected in the assertion of such a right in respect of their short actual prior user, by reason of their uncandid conduct in receiving and inserting in other publications of theirs advertisements of the forthcoming rival magazine under the title in dispute, at the very time when they were hastening on their own publication.

No costs given on either side in either suit.[1]

266. Deiz *v.* Lamb.

November, 1866. *N. Y. Super. Ct.: Monell, J.* — 29 *N. Y. Super. Ct.* (6 *Robertson*) 537.

THE plaintiff having purchased the "*Prescott House*" Hotel, the defendant, a coach proprietor, who had had a revocable license from the former proprietor of the hotel to place the name "*Prescott House*" upon his coaches, continued so to use the name of the hotel.

On motion by the plaintiff injunction granted to restrain the defendant from so doing, on the ground that the license had determined upon the sale of the hotel to the plaintiff.[2]

267. Morgan *v.* McAdam.

December 5, 1866. *Wood, V. C.* — 36 *L. J. Ch.* 228; 15 *L. T. N. S.* 348.

THE plaintiffs being manufacturers of crucibles, who traded under the name of "*The Patent Plumbago Crucible Co.*," and sold their crucibles as "*Patent Plumbago Crucibles*," the defendants began to trade under the same name, and to sell their crucibles under the same name.

Injunction to restrain the defendants from so doing refused, on the ground that the plaintiffs' crucibles were not and never had been the subject of a patent, though the plaintiffs stated that they had been informed by one of the persons from whom they had bought the secret of the construction of the crucibles that there was an American patent; and

Held, that, since the objection to the plaintiffs' title had

[1] See *preceding case.*

[2] See *Howard* v. *Henriques*, **108.**

already been brought to their notice by the dismissal on that ground of a summons brought by them before a magistrate, under the Merchandise Marks Act, 1862, the bill must be dismissed with costs.

Held, further, that where an article had, during the existence of a patent, been sent into the market as "patent pins," "patent wire," etc., on the expiration of the patent the marked articles might still be sold, though it would be better to place on them the date of the patent.

"All that this court has to determine is, has the plaintiff, who comes here to seek relief, any ground whatever for asking the court to assist him in the protection of that right which he sets up? If the court finds it to be a right founded upon fraud, and certainly, in effect, this is such, the court says it cannot assist a person in carrying on a fraud." [1]

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268. Scott *v.* Scott.

December 13, 1866. *Wood, V. C.* — 16 *L. T. N. S.* 143.

On the dissolution of the partnership of "*Robert & Walter Scott*," the interest of the plaintiff, W. Scott, in the partnership premises was purchased by his partner, R. Scott, and it was agreed that each should be at liberty to carry on the business, but that the old name should not be used by either, except for winding up the affairs of the partnership. The defendants, having been placed in possession of the old premises by R. Scott, began to style themselves on a door-plate "*Scott & Nixon, late Robert & Walter Scott.*"

On motion by the plaintiff injunction granted to restrain the defendants from using a door-plate with an inscription representing that they were carrying on business in continuation of or in succession to the old firm, on the ground that the effect of the new plate was to represent the plaintiff as having retired from business, and to appropriate his interest in the good-will of the old firm.

[1] See *Pidding* v. *How*, 60.

269. Gillott *v.* Esterbrook.

January, 1867; January, 1872. *N. Y. Sup. Ct.* — 47 *Barb.* 455; *R. Cox*, 340. *N. Y. Comm. of App.* — 48 *N. Y.* (3 *Sickles*) 374; 8 *Amer. Rep.* 553.

THE plaintiff being a penmaker who stamped his pens "*Joseph Gillott, Extra Fine*, 303," and sold them in boxes labelled with the same name and figures, the defendants began to sell other pens similarly stamped, in boxes similarly labelled, except that they put their name, "*Esterbrook & Co.*," in place of "*Joseph Gillott.*"

Injunction granted to restrain the defendants from using the figures "303," with damages and costs.

Per Potter, J. "The principle, in short, is, that no man has a right to sell his own goods as the goods of another, and the courts will lend their aid to prevent the imposition; but there is a limitation to this right. The trade-mark which is entitled to protection must be such as will identify the article to which it is affixed as that of the person adopting it, and distinguish it from others."

P. 348. "A word that is well known in the language and which is the name of an article, or words that merely indicate the quality of an article, cannot, it seems, be so exclusively appropriated as a trade-mark. Nor can the appropriated name of a manufactured article, if the article is a known substance or production, be exclusively used as a trade-mark, except by those who have an exclusive property in the article itself, though a mere name may be protected as a trade-mark where it is used merely to indicate the true origin or ownership of the article offered for sale, or when a new preparation or compound is made, and a distinctive and specific name is necessarily given to it, which has not before by adoption and use become known." [1]

270. Matsell *v.* Flanagan.

January, 1867. *N. Y. C. P.: Brady, J.* — 2 *Abb. Pr. N. S.* 459; *R. Cox*, 367.

THE plaintiffs being the proprietors and publishers of *The National Police Gazette*, commonly known as *The Police Ga-*

[1] See *Lawrence Man. Co.* v. *Lowell Hosiery Mills*, 676.

zette, the defendants began to publish another paper under the name of *The United States Police Gazette.*

Motion by the defendants to dissolve an injunction which had been granted on motion by the plaintiffs, to restrain them from publishing a paper under that name, refused, there being evidence of actual deception.

"The enforcement of the doctrine that trade-marks shall not be simulated does not depend entirely upon the alleged invasion of individual rights, but as well upon the broad principle that the public are entitled to protection from the use of previously appropriated names or symbols, in such a manner as may deceive them, by inducing or leading to the purchase of one thing for another." [1]

271. Dixon *v.* Jackson.

January 29, 1867. *Ct. of Session. — Ct. of Sess. Cas. 3d Ser. V.* 326; 2 *Scot. L. Rep.* 188.

THE plaintiffs being iron-masters at Govan, who were in the habit of marking their bar iron "*Govan,**" from which they alleged that it had acquired the name of "*star iron;*" the defendant, who was an iron-master at Coats, and had been in the habit of marking his bar iron with the word "*Coats*" simply, began to mark it "*Coats.**"

Interim interdict granted to restrain the defendant from so doing.

272. Graveley *v.* Winchester.

March 14, 1867. *Wood, V. C. — Seton, 4th ed.* 257.

THE plaintiffs being a firm of engineers, who had purchased the business of Winchester & Co., the defendant began to carry on business under the name of "*Winchester & Co.*"

On motion by the plaintiffs injunction granted to restrain the defendant from so doing, and from representing that he was carrying on business in succession to that carried on by that firm, with directions for the delivery up of trade-cards or circulars, and an inquiry as to damages.

[1] See *Hogg* v. *Kirby*, 10.

273. Stephens *v.* Peel.

March 21, 1867. *Wood, V. C.* — 16 *L. T. N. S.* 145.

THE plaintiffs being ink-makers, who sold their ink in bottles bearing labels consisting in part of white letters on a red ground, in part of white letters on a blue ground, and in part of blue letters on a white ground, with a white crown, and the words "*Stephens' Blue Black Writing Fluid*" in white, the defendant began to sell other ink in bottles similarly labelled, but having the word "*Steelpens*" substituted for "*Stephens'*."

On motion by the plaintiffs injunction granted to restrain the defendant from using labels calculated to deceive.

274. Blackwell *v.* Crabb.

April 25, 1867. *Wood, V. C.* — 36 *L. J. Ch.* 504.

THE plaintiffs being manufacturers of pickles, which they sold in bottles bearing a label composed of a number of details, the defendant began to sell other pickles in similar bottles labelled very similarly.

Motion by the plaintiffs for an injunction to restrain the defendant from selling pickles in bottles so labelled refused, on the ground that, though there was a considerable general resemblance between the two, the name, to which a customer would look to discover the identity, was conspicuously different, and there were other points of difference, besides that the elements combined in the labels were, for the most part, of common right.

275. Farina *v.* Cathery.

April 26, 1867. *Wood, V. C.* — *L. J. Notes of Cases*, 1867, *p.* 134.

THE plaintiff being a German manufacturer of Eau de Cologne, which he sold in bottles bearing a special label, the defendants, as agents for another German manufacturer, sold other Eau de Cologne in bottles labelled in exact imitation of

the plaintiff's, except that the word "Josephs" was substituted for the word "Jülichs."

Injunction granted to restrain the defendants from so doing; and *Held*, that a defence that the defendants' labels had been exhibited in the United Kingdom many years previously, and that their use was not prohibited by Prussian law, failed, on the ground that progressive alterations had been made in the labels, producing greater and greater similarity to the plaintiff's, and varying the device to which a right was alleged to have been acquired in Germany.

276. Smith *v.* Woodruff.

April, 1867. *N. Y. Sup. Ct.* — 48 *Barb.* 438; *R. Cox*, 373.

THE plaintiffs being compounders of a perfume, which they sold under the name of "*Sweet Opoponax of Mexico*," the defendant began to sell another perfume under the same name.

Injunction granted to restrain the defendant from so doing; and *Held*, (1.) that that name had become indicative of the plaintiffs' article, though it had been used by others before them; (2.) that evidence produced by the defendant to show the absence of opoponax from the plaintiffs' composition being contradicted, and that fact, even if established, not proving any flagrant imposition on the part of the plaintiffs, a defence based on the plaintiffs' own alleged misstatements failed.[1]

277. Burnett *v.* Phalon.

June, 1867. *N. Y. Super. Ct.* — 22 *Monthly L. R.* (12 *N. S.*) 220; 9 *Bos.* 193; *R. Cox*, 376. *N. Y. Ct. of App.* — 3 *Keyes*, 594; 3 *Trans. App.* 167; 5 *Abb. Pr. N. S.* 212; *R. Cox*, 397.

THE plaintiffs being manufacturers of a hair-oil which they sold under the name of "*Cocoaine*," the defendants began to sell an oil of their own under the name of "*Cocoïne*."

[1] See *Pidding* v. *How*, 60

Injunction granted to restrain the defendants from selling their oil under that name, or any other name imitated from the name applied by the plaintiffs to their oil, that name being held to be a valid trade-mark and the property of the plaintiff.

Per Pierrepont, J. "Every man has a right to the reward of his skill, his energy, and his honest enterprise; and when he has appropriated, as his trade-mark, letters combined into a word before unknown, and has used that word, and has long published it to the world as his adopted trade-mark, he has acquired rights in it which the courts will protect."[1]

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278. Faber *v.* Faber.

June, 1867. *N. Y. Sup. Ct.: Sutherland, J.* — 49 *Barb.* 357; 3 *Abb. Pr. N. S.* 115; *R. Cox*, 401.

THE plaintiff being a maker of lead pencils, which he stamped "A. W. Faber," the defendant, John H. Faber, sold other pencils stamped with his name.

Motion to continue an injunction which had been granted to restrain the defendant from so doing refused, on the

[1] This is a leading case, as illustrating the doctrine that a coined word may be protected against other words which are *idem sonans*. The defendants' label was quite unlike plaintiffs', and the chance of deception was limited, it may be assumed, to persons who purchased relying upon the name. There are numerous cases to the same effect, and none which are to be regarded as controverting it. The rule is lucidly stated in *Carroll* v. *Ertheiler*, **672**, which see.

The decision in *Burnett* v. *Phalon* is also of pronounced interest and value, as emphasizing the principle, that although an article may have no other name than that which is claimed as a trade-mark, the name may be monopolized. There are considerations of great weight that tend to negative the correctness of this conclusion, but those which make in favor of it have been generally accepted in the United States. The coined words, "BOVILINE," "SAPOLIO," "CARBOLINE," "VASELINE," etc., may be mentioned as illustrations.

Another point which was indirectly decided in sustaining the word "*Cocoaine*" is, that words which point to, without describing, the ingredients of an article, may be valid trade-marks in the United States. The plaintiffs' article was a preparation of cocoa-nut oil, and the word "*Cocoaine*" was broadly suggestive of the fact. This circumstance was not lost sight of by the court, but was treated as of little weight. The rule in England, however, is different. Thus, the words "LINOLEUM" (**536**), "VALVOLINE" (**597**), etc., have been held to be *publici juris*, by reason of their being descriptive.

ground that the defendant was entitled to use his own name without fraud.[1]

279. Fulton *v.* Sellers.

1867. *Penn. Sup. Ct.* — 4 *Brews.* 42.

THE plaintiffs (respondents) being the proprietors, by assignment, of a medical preparation which they sold under the name of the original inventor, as "*Dr. J. M. Lindsey's Improved Blood Searcher*," the defendants (appellants) began to sell another compound under similar name.

Suit for an injunction to restrain the defendants from infringing the plaintiffs' rights.

Held, (1.) that the words in question constituted a legitimate trade-mark; (2.) that such trade-mark passed to the plaintiffs, under their agreement with the original inventor for the purchase of all his right, title, and interest in the article known by the name in question, and of a right to take his name and all his interest, so far as was necessary; (3.) that the plaintiffs were not disentitled by reason of their using the name without words to mark their derivative title; (4.) and that the injunction must be granted.

"A manufacturer or vendor cannot adopt words in common use descriptive of similar articles, and call upon a court to prevent other parties from using them. Such words cannot be made trade-marks, nor can words which simply define the nature, kind, or quality of articles sold. If a trade-mark consists of words, as it may, they must be specific and distinctive in their meaning. They must point to the articles and to nothing else. It is undoubtedly true that the name of an inventor or discoverer or manufacturer may be employed as a part of a trade-mark. It may give to other parts of the appellation a distinctive character, or, rather, it may make words distinctive that without the name would not be. Such trade-marks are recognized as legitimate."

"The right to use his (the vendor's) name and all his interest must include the right to the use of the trade-mark. That was an interest of the vendor; he had a property in the trade-mark."

[1] See *Burgess* v. *Burgess*, 117.

"We do not think the position tenable that the complainants are not entitled to relief because they are only assignees of the trade-mark, and use it without designating themselves assignees. We do not perceive how their using the mark after they bought it, without giving notice that they are not the original owners of it, can be fraud upon the public, of which the defendant can avail himself. A trade-mark, like the good-will of a shop or manufacturing establishment, is a subject of commerce, and it has many times been held entitled to protection at a suit of the vendees."

280. Field *v.* Lewis.

August 3, 1867. *Wood, V. C. — Seton, 4th ed.* 237.

THE plaintiffs having long manufactured and sold soap under the name of "*United Service*" soap, the defendant began to sell other soap under the same name.

Injunction granted to restrain the defendant from using the name in question, with costs, notwithstanding that the defendant had placed his own name on his own label, and that there was no evidence of actual deception, and that the bill had been filed without any previous intimation being given to the defendant.

281. Davis *v.* Kennedy.

September 3, 1867. *Canada West Chanc.: Mowat, V. C. — Codd. Dig.* 236.

THE plaintiff being the inventor and manufacturer of a medical preparation, which he called and labelled "*Perry Davis' Vegetable Pain Killer*," the defendant began to manufacture and sell a similar article, under the name of "*The Great Home Remedy, Kennedy's Pain Killer*," but with quite different labels.

Injunction granted to restrain the defendant from using the words "*Pain Killer*" in connection with his preparation, that term being held to be a fancy name indicative of the plaintiff's article.[1]

[1] See *Davis* v. *Kendall*, 103.

282. Newman *v.* Alvord.

September, 1867; September, 1872. *N. Y. Sup. Ct.* — 49 *Barb.* 588; 35 *How. Pr.* 108; *R. Cox*, 404. *N. Y. Comm. of App.* — 51 *N. Y.* (6 *Sickels*) 189; 10 *Amer. Rep.* 588.

THE plaintiffs manufacturing cement at Akron, in Erie County, New York, which they sold in packages labelled "*Newman's Akron Cement Co., manufactured at Akron, N. Y. The Hydraulic Cement, known as the Akron Water Lime*," the defendants, who manufactured cement at Syracuse, in Onondaga County, New York, began to sell it in packages labelled "*Alvord's Onondaga Akron Cement, or Water Lime, manufactured at Syracuse, New York.*"

Injunction granted to restrain the defendants from using the word "*Akron*" in connection with their cement, although, if the defendants had manufactured at Akron, the decision might have been different.

Per Daniels, J. (R. Cox, 413). "Where words or names are in common use, the law does not permit an appropriation of them as trade-marks to be made, so far as they are comprehended by such use. And for that reason words and names having a known or established signification cannot, within the limits of such specification, be exclusively appropriated to the advancement of the business purposes of any particular individual, firm, or company. The inability to make such appropriation of them arises out of the circumstance that, on account of their general or popular use, every individual in the community has an equal right to use them, and that right is in all cases paramount to the rights and interests of any one person, firm, or company. What alike may be claimed and used by all cannot be exclusively appropriated to advance the interests of any person. . . . . But while this limitation is entirely reasonable, there can be no propriety in extending it beyond the circumstance upon which it is founded; and accordingly any member of the community whose interests and business may be promoted by doing so should be at liberty to apply even names and words in common use to the products of his industry, in such a manner as to indicate their origin or particular manufacture, where such application will not intrench upon and be in no way included in their use by the public. By doing so,

the rights of no member of the community can be in any manner infringed, and no public inconvenience whatever can be occasioned by it. The public will still be left at full liberty to use such words or terms as they were used before; while for a special purpose a new office or purpose may be imposed upon them."

283. Rogers *v.* Taintor.

October, 1867. *Mass. Sup. Ct.* — 97 *Mass.* (1 *Browne*) 291.

FAY, Joslin, Rogers, and Taintor manufactured machinery in partnership at Worcester (Mass.), under the name of "*Fay & Co.*" Fay, Joslin, Rogers, and Cheney did the same at Cincinnati, under the same name. After Fay's death the two businesses continued to be carried on as before by the respective surviving partners, until the dissolution of the Worcester firm, when the defendant Taintor, one of the partners in that firm, bought the business and good-will, and continued to carry on business in the same name, but as a vendor of machines not manufactured by him.

Suit by the Cincinnati firm for an injunction to restrain him from using the name in his business or on machines not made by the plaintiffs.

Injunction to restrain him from so doing refused, on the ground that, (1.) the name in question was not that of any of the plaintiffs; (2.) the representative of Fay was not a party to the suit (this refers to the Mass. Gen. St. c. 56); (3.) the defendant was carrying on business in continuation of the Worcester firm, and did not assume any connection with the plaintiffs; (4.) the defendant, if he had a right to use the name at all, had a right to use it as he pleased, on goods of his own make, or otherwise; (5.) the plaintiffs could not have acquired, by the dissolution of the Worcester firm, which was quite distinct from theirs, any special rights in the name beyond such as they had already.

284. Howe *v.* The Howe Machine Company.

November, 1867. *N. Y. Sup. Ct.* — 50 *Barb.* 236; *R. Cox*, 421.

THE plaintiff, A. B. Howe, being a manufacturer of sewing-machines, which he made under a license from his brother, Elias Howe, the patentee, and stamped with the name "*Howe*," the defendant company, claiming under Elias Howe, began to manufacture other machines, and to stamp them in the same way.

On appeal from an order dissolving an injunction which had been granted to restrain the defendants from so doing:

Held, (1.) that the plaintiff was entitled to appropriate the name as his trade-mark on sewing-machines, to the exclusion of his brother, Elias Howe, the original inventor and patentee of the particular machine, which the plaintiff only made by his license, and also of the defendant company; but (2.) that, there being a question whether Elias Howe was not entitled to use the trade-mark under an agreement between him and the plaintiff, no injunction could be granted before the trial.

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285. R. *v.* Suter and Coulson.

November 16, 1867. *C. C. R.* — 10 *Cox*, 577; 17 *L. T. N. S.* 177; 16 *W. R.* 141.

ON an indictment for obtaining money on false pretences:

Held, that the prisoners, who had obtained money by falsely representing a spurious stamp on a watch to be a genuine hall-mark of the Goldsmiths' Company, and to prove the watch to be of 18-carat gold, were rightly convicted.

Per Kelly, C. B. "There is no difference in principle between a misrepresentation of a mark, and one that an acceptance was the acceptance of John Jones, or any other person."

286. The Liebig's Extract of Meat Company (Limited) *v.* Hanbury.

November 19, 1867. *Wood, V. C.* — 17 *L. T. N. S.* 298.

THE plaintiffs being manufacturers and vendors of "*Liebig's Extract of Meat*," the defendants began to prepare meat in accordance with Liebig's recipe, and to sell it under the same name.

Injunction to restrain the defendants from using the name refused, on the ground that the name had for some time past been in common use as descriptive of an article prepared in a particular manner, and that it would be injurious to the defendants to require them to change the name of their article.[1]

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287. R. *v.* Hunter.
R. *v.* Carter.

November 23, 1867. *C. C. R.* — 10 *Cox*, 642; 17 *L. T. N. S.* 321; 16 *W. R.* 342.

ON indictments for obtaining money under false pretences:

Held, that the prisoners, who were coal-hewers, and had obtained payment for more work than they had done, by removing the tokens or tickets of others from the tubs of coal and substituting their own, were rightly convicted.

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288. Lamplough *v.* Balmer.

December 3, 1867. *Wood, V. C.* — *W. N.* 1867, *p.* 293.

THE plaintiff selling a medical compound as "*Pyretic Saline*," the defendant began to sell another article under the name of "*Balmer's Pyretic Salts.*"

Motion by the plaintiff for an injunction to restrain the defendant from so doing refused, on the ground that the plaintiff's labels contained the words "*Royal Letters Patent*,"

[1] This case was decided upon the assumption that, as matter of fact, the word "*Liebig's*" had become a purely descriptive one, in the connection in which it was used by the plaintiffs.

he not having taken out any patent, and notwithstanding an explanation by the plaintiff that he had used the term in consequence of his having long paid duty on his medicine as a patent medicine.[1]

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289. Caswell *v.* Davis.

December, 1867; September, 1874. *N. Y. C. P.*—4 *Abb. Pr. N. S.* 6; 35 *How. Pr.* 76; *R. Cox*, 429. *N. Y. Ct. of App.*—58 *N. Y.* (13 *Sickels*) 223.

THE plaintiffs being the compounders of a medicine which they called "*Ferro-phosphorated Elixir of Calisaya Bark*," the defendant, who had been in the plaintiffs' employ, began to sell another preparation as "*Davis & Sons' original and genuine Ferro-phosphorated Elixir of Calisaya Bark.*"

Suit for an injunction to restrain the defendant from so doing.

Held, on appeal, that an injunction could not be granted to restrain the defendant from using the word "*Ferro-phosphorated*," the word being descriptive of the composition of the medicine.

Per Folger, J. (58 N. Y. 233). "There is no principle more firmly settled in the law of trade-marks than that words or phrases which have been in common use and which indicate the character, kind, quality, and composition of the thing may not be appropriated by any one to his exclusive use. In the exclusive use of them the law will not protect. Nor does it matter that the form of words or phrases adopted also indicate the origin and maker of the article. The combination of words must express only the latter. It is the result of all the decisions that known words and phrases indicative of quality and composition are the common property of all mankind. They may not be appropriated by one to mark an article of his manufacture, when they may be used truthfully by another to inform the public of the ingredients which make up an article made by him."[2]

[1] See *Pidding* v. *How*, 60.

[2] See *Lee* v. *Haley*, 325.

290. Peabody *v.* Norfolk.

January, 1868. *Mass. Sup. Ct.: Gray, J.* — 98 *Mass.* (2 *Browne*) 452.

THE plaintiff having invented a secret process of manufacture of cloth, and the defendant Norfolk having, on entering into the plaintiff's service, undertaken not to give information in regard to the process to any one, the defendant Norfolk left the plaintiff's employ, and entered into an arrangement with other persons, by which they were to build another factory for the purpose of manufacturing there according to the plaintiff's secret process, which the defendant Norfolk was to communicate to them.

Injunction granted to restrain the defendant Norfolk from carrying out such arrangement and making such communication, and also to restrain the defendant Cook, who was one of the persons with whom the arrangement had been made, and who was fully aware of the circumstances, from acting in execution of such arrangement.

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291. Curtis *v.* Bryan.

January, 1868. *N. Y. C. P.* — 2 *Daly*, 212; 36 *How. Pr.* 33; *R. Cox*, 434.

THE plaintiffs being the makers of a medicine for children, which they sold under the name of "*Mrs. Winslow's Soothing Syrup*," and in bottles stamped and labelled in English, French, German, and Spanish, the defendant began to sell another medicine under the same name, in similar bottles, similarly labelled.

Injunction granted to restrain the defendant from infringing the plaintiffs' rights; and

Held, (1.) that the plaintiffs were not disentitled by merely collateral misrepresentations, if established; (2.) that a defendant who had imitated the plaintiffs' article could not be heard to say that it was injurious.

Per Van Vorst, J. "I cannot understand how the right of a plain-

tiff to be protected in a trade-mark adopted by him is to be affected by advertisements of his article in the newspapers. The trade-mark is one thing, the notices or commendations of his medicines, when the inventor offers them for sale, are quite another. If the trade-mark contained a false statement, and the advertisement of the plaintiff tended to establish it, they might be used for that purpose, and, except as it bore on that question, it would not answer to determine the right of a plaintiff to protection in his trade-mark by the standard of credit allowed to an advertisement of the qualities of the article." [1]

292. Kelly *v.* Hutton.

February 8, July 30, 1868. *Stuart, V. C.* — 37 *L. J. Ch.* 297 ; 17 *L. T. N. S.* 591. *Wood and Selwyn, L. JJ.* — *L. R.* 3 *Ch.* 703; 37 *L. J. Ch.* 917; 19 *L. T. N. S.* 228; 16 *W. R.* 1182.

SUIT for the establishment of the plaintiff's claim to one moiety of the *Sporting Life* newspaper.

Held (on appeal), that the registration at Stationers' Hall, under the Copyright Acts, of an assignment of a share in the newspaper, was of no effect, the title of a newspaper not being a subject of copyright.

Per Wood, L. J. "It appears to us that there is nothing analogous to copyright in the name of a newspaper, but that the proprietor has a right to prevent any other person from adopting the same name for any other similar publication; and that this right is a chattel interest capable of assignment was held in *Longman* v. *Tripp* and *Ex parte Foss.*

293. Barnard *v.* Pillow.

March 19, 1868. *Lord Romilly, M. R.* — *W. N.* 1868, *p.* 94.

THE plaintiff being a writer and composer of songs and music, under the name of "*Claribel*," the defendants, music publishers, published and sold certain songs, of which the plaintiff had written the words but not composed the music,

[1] A critical examination of this case will disclose that it may not have been intended to carry the conclusions of law on which it rests quite as far as would be inferred from a casual reading of the opinion.

with the words, "*Song, written by Claribel*," on the title-page.

Motion by the plaintiff for an injunction to restrain the defendants from publishing the songs in that manner, as being calculated to mislead as to the authorship of the music, refused, on the ground that the words "*written by*" did not mean the same as "*written and composed by*," and that ordinary purchasers using ordinary caution would not be deceived.

294. Boulnois *v.* Peake.

March 19, 1868. *Giffard, V. C.* — *W. N.* 1868, *p.* 95.

THE plaintiffs being carriage-dealers, who had for many years sold carriages at the "*Carriage Bazaar*" in Baker Street, the defendant set up in business as a carriage-dealer at a house also in Baker Street, which at first he styled the "*Carriage Repository*," but afterwards began to style the "*New Carriage Bazaar*," and to describe as "*opposite Madame Tussaud's*," which was not strictly correct.

On motion by the plaintiffs, injunction granted to restrain the defendant from applying those designations to his shop, on the ground that the defendant had acted with the intention of gaining an unfair advantage over the plaintiffs.[1]

295. Stephens *v.* De Conto.

March, 1868. *N. Y. Super. Ct.: Monell, J.* — 4 *Abb. Pr. N. S.* 47; 30 *N. Y. Super. Ct.* (7 *Robertson*) 343; *R. Cox*, 442.

THE plaintiff being the proprietor of a newspaper called *La Cronica*, the defendant began to publish another paper under the name of *El Cronista*.

Injunction, which had been granted to restrain the defendant from so doing, dissolved, on the ground that the names were sufficiently dissimilar to prevent deception.[2]

[1] See *Howard* v. *Henriques*, **108.** [2] See *Hogg* v. *Kirby*, **10.**

296. Falkinburg *v.* Lucy.

April, 1868. *Cal. Sup. Ct.* — 35 *Cal.* 52; *R. Cox*, 448.

THE plaintiffs being manufacturers of washing powder, which they sold in packets labelled with a complicated design, the defendants began to sell other washing powder in packets somewhat similarly labelled.

On appeal, injunction, which had been granted to restrain the defendants from infringing the plaintiffs' rights, dissolved, on the ground that the design which constituted the plaintiffs' trade-mark had not been copied, and that the particulars in which the defendants' label resembled the plaintiffs' were in the nature of directions for use, words in common use, etc., and not the subjects of a right of trade-mark.[1]

297. Stevens *v.* Paine.

June 11, 1868. *Giffard, V. C.* — 18 *L. T. N. S.* 600.

THE defendants having been in the employ of the plaintiffs' firm of "*Clayton & Co.*" left them, and began to issue circulars calculated to mislead the public into the belief that the firm of Clayton & Co. had ceased to carry on business, and that they had been succeeded by the defendants.

On motion by the plaintiffs, injunction granted to restrain the defendants from so doing.

298. Schweitzer *v.* Atkins.

July 16, 1868. *Malins, V. C.* — 37 *L. J. Ch.* 847; 19 *L. T. N. S.* 6; 16 *W. R.* 1080.

THE plaintiff being the manufacturer of a preparation of cocoa, which he sold in packets labelled with the words "*Schweitzer's Cocoatina, or Anti-Dyspeptic Cocoa, Registered,*" the defendant Atkins, who had been in the plaintiff's employ, left him, and went into partnership with the defendant Otto Schweitzer, and began to sell another preparation

[1] See *Coffeen* v. *Brunton*, 99.

under the name of "*Otto Schweitzer, Atkins & Co.'s Cacaotine, Registered*," in packets labelled in imitation of the plaintiff's.

On motion by the plaintiff, injunction granted to restrain the defendants from infringing the plaintiff's rights.

299. Rivero *v.* Norris.

July 30, 1868. *Giffard, V. C.* — *Seton, 4th ed.* 236.

THE defendant had at the docks boxes of cigars branded and labelled in imitation of the plaintiff's trade-mark and label.

On motion by the plaintiff, injunction granted to restrain the defendant from passing such boxes of cigars from the docks into the market.

300. Messerole *v.* Tynberg.

September, 1868. *N. Y. C. P.: Brady, J.* — 4 *Abb. Pr. N. S.* 410; 36 *How. Pr.* 14; *R. Cox*, 479.

THE plaintiffs being manufacturers of paper collars, which they sold with the name "*Bismarck*" on them, the defendant began to sell the same article bearing the same name.

Motion by the defendant to dissolve an injunction which had been granted to restrain him from so doing refused.

"Whenever a trade-mark is employed to designate a particular manufacture, whether the term used is a popular one formed of words or symbols common to the world, or one expressly created for the purpose to which it is applied, and the manufacture acquires reputation and becomes valuable as an article of merchandise, an imitator thereof, for a kindred or similar manufacture, is presumed to intend wrongfully, and the burden rests upon him to show that there is either no property in the term or symbol arising from priority of use for the article to which it has been applied, or that no deceit or injury can result from the imitation."

301. Rowley *v.* Houghton.

September, 1868. *Phila. C. P.: Ludlow, J.* — 2 *Brews.* 303; 7 *Phila.* 39; *R. Cox*, 486.

THE plaintiff being a manufacturer of glass jars, which he stamped with the words "*The Hero*," and who afterwards began to stamp his jars with the words "*The Heroine*," the defendant began to stamp other jars with the words "*The Heroine*," before the plaintiff adopted those words as an alternative for "*The Hero*."

Injunction granted to restrain the defendant from using the name "*The Heroine*," although he had used that name before the plaintiff had adopted it as an alternative for his mark "*The Hero*."

"No right can be absolute in a name as a name merely. It is only when that name is printed or stamped upon a particular label or jar, and thus becomes identified with a particular style and quality of goods, that it becomes a trade-mark."

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302. Boardman *v.* The Meriden Britannia Company.

September, 1868. *Conn. Sup. Ct.* — 35 *Conn.* 402; *R. Cox*, 490.

THE plaintiffs being makers of teaspoons, which they sold in packets bearing labels, of which the principal features were their names and a number coupled with some other particulars, the defendant company began to sell other teaspoons in packets with labels similar in general appearance to the plaintiffs', and with the same numbers, but with the name of the company.

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

Per Carpenter, J. "The object or purpose of the law in protecting trade-marks as property is twofold: first, to secure to him who has been instrumental in bringing into market a superior article of merchandise the fruit of his industry and skill; second, to protect the community from imposition, and furnish some guarantee that an arti-

cle purchased as the manufacture of one who has appropriated to his own use a certain name, symbol, or device as a trade-mark, is genuine. Consequently, the violation of property in trade-marks works a twofold injury: the appropriator suffers, in failing to receive that remuneration for his labors to which he is justly entitled; and the public in being deceived and induced to purchase articles manufactured by one man, under the belief that they are of the production of another."

"It may be difficult to give to bare numbers the effect of indicating origin or ownership, and it may be still more difficult to show that they were originally designed for that purpose; but if it be once shown that that was the original design, and that they have had that effect, it may not be easy to assign a reason why they should not receive the same protection, as trade-marks, as any other symbol or device. But in this case the numbers were associated with the name of the plaintiffs, and the form, color, and general arrangement of the labels; and, by virtue of that connection, form an important part of the trade-mark itself."[1]

303. Newling *v.* Dobell.

November 19, 1868. *Malins, V. C.* — 38 *L. J. Ch.* 111; 19 *L. T. N. S.* 408.

THE defendant, after having sold to the plaintiff the goodwill of his tailor's business, and covenanted "not to carry on or be concerned or interested in" the business of a tailor within five miles of his former shop, entered as a journeyman into the service of his nephew, who carried on the same trade, and under the same name, within the five miles.

On motion by the plaintiff, injunction granted to restrain the defendant from so committing a breach of his covenant.

304. Cave *v.* Myers.

December 3, 1868. *Giffard, V. C.* — *Seton, 4th ed.* 238.

THE plaintiffs carrying on business at 31A Wigmore Street, and 1 Edwards Street, Portman Square, as manufacturers and sellers of trunks and ladies' dress baskets (for which they had gained a first prize at the Paris Exhibition of 1867), under

[1] See *Gillott* v. *Esterbrook*, **269**.

the name of "*H. J. Cave & Sons*," and having been, since 1863, appointed to supply their goods to the Princess of Wales, the defendant, who occupied a shop at the corner of Wigmore Street and Marylebone Lane, close to the plaintiffs' shop, adopted the name of "*Cavendish House*" for his establishment, and had it painted up by his express order over the frontage, in place of his name "*Myers*," in such a manner that "*Cave*" alone appeared on the Wigmore Street side, the remaining letters being over the angle and in Marylebone Lane; and he also exhibited a board to the following effect: "*Paris Exposition*, 1867. *By Her Majesty's Royal Letters Patent. The only prize awarded for the Royal Alexandra expanding and collapsing dress baskets. Designed for Her Royal Highness the Princess of Wales*, 1865. *The Dublin Exhibition;*" the fact being that, while the defendant had gained the only prize at Dublin, the plaintiffs had gained the only prize at Paris, though the defendant had competed. The defendant also exhibited a letter from a member of the household of the Princess of Wales, acknowledging the receipt of an application by the defendant for the appointment of trunk-maker to the Princess, but containing no promise of such an appointment, in such a manner as to cause it to be taken as containing an actual appointment.

On motion by the plaintiffs for an injunction to restrain the defendant from representing his business to be the plaintiffs', and from using any name, inscription, or device calculated to mislead the public:

Held, (1.) That the plaintiffs were not disentitled by reason of having described themselves as patentees, they having secured the exclusive manufacture of their baskets by registration as a design, though not by letters patent; (2.) that the plaintiffs were not disentitled by reason of a moderate delay, but that they were justified in a certain degree of delay in order to obtain evidence of actual deception, which they had succeeded in doing in several cases; (3.) that the defendant had acted in a manner intended and calculated to deceive, and which had deceived, and that the injunction must be granted.

305. Colton *v.* Thomas.

December, 1868. *Phila. C. P.: Allison, P. J.* — 7 *Phila.* 257; 2 *Brews.* 308; *R. Cox*, 507.

THE plaintiff practising as a dentist under the name of "*The Colton Dental Association*," the defendant, who had been in the plaintiff's employ, left him, and set up in business as a dentist, and began to style himself on his door and on his cards "*Dr. F. R. Thomas, late Operator at the Colton Dental Rooms*," the words "*late operator at the*" being in very small letters.

Injunction granted to restrain the defendant from using such signs and cards, and from representing his place of business to be the plaintiff's.

"An imitation with partial difference, such as the public would not observe, does as much harm as an entire counterpart. If such variations impose on a portion or class of customers only, it is evident that the damage is of the same character, though varied in amount or degree."

306. Town *v.* Stetson.

December, 1868. *N. Y. C. P.* — 5 *Abb. Pr. N. S.* 218; 3 *Daly*, 53; *R. Cox*, 514.

THE plaintiff being a dealer in "*Desiccated Codfish*," the defendant began to sell fish under the same name.

On motion by the defendant, injunction which had been granted on motion by the plaintiff to restrain the defendant from using that name for his fish dissolved, the name being purely descriptive of the article.

Per Barrett, J. "No manufacturer can acquire a special property in an ordinary term or expression, the use of which as an entirety is essential to the correct and truthful designation of a particular article or compound."

307. Ferguson *v.* The Davol Mills.

December, 1868. *Phila. C. P.: Allison, P. J.* — 2 *Brews.* 314; 7 *Phila.* 253; *R. Cox*, 516.

THE plaintiffs being manufacturers of cotton goods, which they sold ticketed with a label containing the letter K in a double circle, with the words "*No.*" and "*Yds.*," the defendants sold other cotton goods with a similar label.

Injunction to restrain the defendants from using the label refused, on the ground that the label was not indicative of the manufacturer.

308. Palmer *v.* Harris.

January, 1869. *Penn. Sup. Ct.* — 60 *Penn.* 156; *R. Cox*, 523; 8 *Am. L. Reg. N. S.* 137.

THE plaintiff being a maker of cigars, which he sold in boxes bearing labels on which the words "*Golden Crown*" and other matters were printed, the defendant began to sell other cigars in boxes very similarly labelled.

Injunction to restrain the defendant from infringing the plaintiff's rights refused, on the ground that the plaintiff's labels contained false statements as to his cigars being made in Havana, etc., and that, notwithstanding that the statements were in the Spanish language, and not in English.[1]

309. Emerson *v.* Badger.

January, 1869. *Mass. Sup. Ct.* — 101 *Mass.* (5 *Browne*) 82.

CHARLES EMERSON, the inventor of a razor strop which he called "*Emerson's Elastic Razor Strop*," and sold in cases labelled (among other things) with the words "*Charles Emerson, Emerson Place, Charlestown*," taught the trade to five of his nephews, and allowed such of them as left him in his lifetime, and set up on their own account, to use his labels; B. Badger being the earliest of them. At Charles Emerson's

[1] See *Pidding* v. *How*, 60.

death intestate, the plaintiff, being one of the five nephews, and bearing the same name, bought his premises, but the business was not conveyed to any one, and the customers were distributed among the four nephews (exclusive of B. Badger), and the stock in trade among the five. B. Badger continued to carry on his own trade till his death, and the defendant, his son, after him; and the latter used labels describing his razor strops as "Genuine Emerson's Elastic Razor Strop," and stating him to be the "son and successor of B. Badger, senior successor to the original Charles Emerson, Emerson Place, Charlestown," and stating the facts and dates correctly.

Suit by Charles Emerson, junior, for an injunction to restrain the defendant from using the name, address, etc.

Injunction refused, on the ground that no fraud was shown, and that the defendant had acted within his rights.

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310. Bass *v.* Dawber.

January 21, 1869. *Lord Romilly, M. R.* — 19 *L. T. N. S.* 626.

THE plaintiffs being brewers, the prominent features of whose trade-mark consisted of a red pyramid, the words "*Bass & Co.'s Pale Ale*," and the fac-simile of the signature "*Bass & Co.*," the defendants began to use labels bearing a somewhat general resemblance to the plaintiffs', but containing a red Spanish shield reversed, the words "*East India Pale Ale*," and a fac-simile of the signature "*Dawber & Co.*"

Injunction to restrain the defendants from infringing the plaintiffs' rights refused, with costs, the defendants having offered to print their crest in black on the shield.

"If a person has *bonâ fide* taken a label or trade-mark which does resemble the label of another person, and this is not done with the intention to deceive, the court will not require him to change it completely, because a change in a trade-mark is a serious thing. . . . . No tradesman likes to alter his trade-mark completely; it is like beginning a new firm; and therefore in dealing with cases of this description, if the defendant has acted *bonâ fide*, the court will not compel him by injunction to make a totally different thing."

311. Dixon *v.* Holden.

February 24, 1869. *Malins, V. C.* —*L. R.* 7 *Eq.* 488; 20 *L. T. N. S.* 357; 17 *W. R.* 482.

On motion by the plaintiff injunction granted to restrain the defendant from publishing an advertisement falsely stating that the plaintiff was a member of a bankrupt firm, as being calculated to affect injuriously his property in his name and reputation.

312. Du Boulay *v.* Du Boulay.

March 15, 1869. *Privy Council.* — *L. R.* 2 *P. C.* 430–441; 6 *Moo. P. C. N. S.* 31; 38 *L. J. P. C.* 35–38; 22 *L. T. N. S.* 228–231; 17 *W. R.* 594.

On appeal from the Windward Is. Ct. of App., injunction to restrain the defendant from assuming the plaintiff's family name refused, on the ground that there was no right of property in a name, apart from a business.

Per Lord Chelmsford. "In this country we do not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger. The right to the exclusive use of a name in connection with a trade or business is familiar to our law; and any person using that name, after a relative right of this description has been acquired by another, is considered to have been guilty of a fraud, or, at least, of an invasion of another's right, and renders himself liable to an action, or he may be restrained from the use of the name by injunction. But the mere assumption of a name which is the patronymic of a family by a stranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our law affords no redress."

313. Filley *v.* Fassett.

March, 1869. *Missouri Sup. Ct.* — 44 *Mo.* 173; *R. Cox*, 530; 8 *Am. L. Reg. N. S.* 402.

The plaintiff being a maker of stoves, which he sold stamped with the words "*Charter Oak*," and a sprig of oak

leaves, the defendant sold other stoves stamped with the words, but not with the sprig of leaves.

Injunction granted to restrain the defendant from infringing the plaintiff's rights, notwithstanding that only a portion of the plaintiff's mark appeared on his stoves.

And *Held*, that it was no defence that other persons had used the same words subsequently to the plaintiff, without his knowledge, he having taken proceedings in two instances which had become known to him.

Per Currier, J. "The imitation of an original trade-mark need not be exact or perfect. It may be limited and partial; nor is it requisite that the whole should be pirated. Nor is it necessary to show that any one has, in fact, been deceived, or that the party complained of made the goods; nor is it necessary to prove intentional fraud. If the court sees that the plaintiff's trade-marks are simulated in such a manner as probably to deceive customers or patrons of his trade or business, the piracy should be checked at once by injunction."

314. The Amoskeag Manufacturing Company *v.* Garner. (1.)

May, 1869. *N. Y. Sup. Ct.: Barnard, J.*—55 *Barb.* 151; 6 *Abb. Pr. N. S.* 265; *R. Cox*, 541.

THE plaintiffs being manufacturers, but not printers, of cotton cloths, who placed the word "*Amoskeag*" on their cloths, the defendants, who were printers of made cloths, but did not manufacture them, placed the same word on their printed cloths.

On motion by the defendants injunction which had been granted, on motion by the plaintiffs, to restrain them from so doing, dissolved, on the ground that the two trades were distinct, and also the classes of goods produced; and

Held, further, that a delay of nine years after the plaintiffs became aware of the use of the name by the defendants disentitled them to relief.[1]

[1] This decision was reversed on hearing on the merits. See 500.

315. Graham and Co. *v.* Kerr, Dods and Co.

June 14, 1869. *Calcutta High Court: Phear, J.* — 3 *Beng. L. R. App.* 4.

THE plaintiffs being Scotch merchants trading with India, the defendants sold in India goods bearing a mark very similar to that of the plaintiffs'.

On motion by the plaintiffs injunction granted to restrain the defendants from infringing the plaintiffs' trade-mark, notwithstanding that the defendants had only sold the goods marked in the same manner as when received from Scotland, and that no fraudulent intention was proved.

"It is not enough to say that there was no fraudulent intention. That is no reason why an injunction should not be granted. I do not think I have any option if the marks which the defendants have used are those of the plaintiffs; no matter what their intention was, a perpetual injunction would be granted. In the mean time an interlocutory injunction must issue. There is obviously a close imitation."

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316. Marshall *v.* Ross.

July 30, 1869. *James, V. C.* — *L. R.* 8 *Eq.* 651; 39 *L. J. Ch.* 225; 21 *L. T. N. S.* 260; 17 *W. R.* 1086.

THE plaintiffs being manufacturers of thread at Shrewsbury, who sold their thread labelled with the words "*Shrewsbury — Marshall & Co. — Patent Thread*," foreign thread labelled "*Schrewsbury — Marchal — Patent Thread*" was consigned to the defendant, a shipping agent, from abroad.

On motion by the plaintiffs injunction granted to restrain the defendant from dealing with or disposing of the thread, notwithstanding that the plaintiffs had no patent for the thread, on the ground that such use of the word "patent" had, by long usage, come only to denote the character of the thread, and did not imply the existence of any patent.

317. Chance *v.* Sheppard.

July 30, 1869. *Malins, V. C.*

THE plaintiff being the proprietor of a newspaper called "*The Bedfordshire Express and General Advertiser for the Counties of Cambridge, Hertfordshire, Huntingdonshire, and Middlesex*," the defendant began to publish another paper under the name of "*The Bedfordshire Express and General Advertiser for the County*," the words "The Bedfordshire Express" being printed by the defendant in the same style as by the plaintiff.

On motion by the plaintiff injunction granted to restrain the defendant from so doing.

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318. Newby *v.* The Oregon Central Railway Company.

August 3, 1869. *U. S. C. C. Dt. of Oregon: Deady, J.* — *Deady*, 609; 9 *Amer. Rep.* 331 *n.*

THE plaintiff being a bondholder and creditor of the "*Oregon Central Railway Co.*," the defendant company was started under the same name.

Suit for an injunction to restrain the defendant company from assuming the name, on the ground that such a course of conduct was calculated to depreciate the property of the original company.

On demurrer, *Held*, that the original company would be entitled to an injunction, but that the plaintiff was not entitled to sue until that company had refused itself to bring the suit.

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319. Lockwood *v.* Bostwick.

September, 1869. *N. Y. C. P: Daly, C. J.* — 2 *Daly*, 521; *R. Cox*, 555.

THE plaintiffs being the assignees of the business of a certain clarifying company, manufactured, in succession to the company, a pomade under the name of "*Bovilene*." The

defendants began to sell another pomade under the name of "*Bovina.*"

Motion by the defendants to dissolve an injunction which had been granted to restrain them from infringing the plaintiffs' rights refused.

"There is a right of property in a trade-mark which is capable of being transferred to another."[1]

320. Bradbury *v.* Beeton.

November 3, 1869. *Malins, V. C.* — 39 *L. J. Ch.* 57; 21 *L. T. N. S.* 323; 18 *W. R.* 33.

THE plaintiffs being the proprietors of "*Punch,*" published weekly at 3*d.*, the defendant began to publish another weekly comic paper at 1*d.*, under the name of "*Punch and Judy.*"

Motion by the plaintiffs for an injunction to restrain the defendant from so doing refused, on the ground that deception was not probable, the names, title-pages, and prices being sufficiently dissimilar.

"Every person who uses a trade-mark, be it a label on a bottle, or the name or title of a periodical or magazine, by his appropriation and user of the name acquires a property in that name, and has a right to restrain any other person from using the same name in such a manner as would lead, or be calculated to lead, the public to believe that they are purchasing one thing when in truth they are purchasing another."[2]

321. Tonge *v.* Ward.

November 8, 1869. *Lord Romilly, M. R.* — 21 *L. T. N. S.* 480.

THE plaintiffs being cloth manufacturers who marked their goods with the name "*Tonge's,*" the defendants' manager, in obedience to an order from a customer, but without the defendants' own knowledge, affixed to goods of the defendants' make tickets with the name "*Tung's.*"

Injunction granted to restrain the defendants from infringing the plaintiffs' rights; and

[1] See *Burnett* v. *Phalon*, 277.

[2] See *Hogg* v. *Kirby*, 10.

Held, that the defendants must also pay costs, although they had stated their ignorance, and offered to give an undertaking to pay £50 to a charity, since they had not offered to submit to a decree in the terms prayed.

"The defendants are bound to know what their agents do, and if they do not know, they are responsible exactly as if they did know."

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322. The Wheeler and Wilson Manufacturing Company *v.* Shakespear.

November 10, 1869. *James, V. C.* — 39 *L. J. Ch.* 36.

THE plaintiffs being American sewing-machine manufacturers, the defendant, who had been their agent for the sale of their sewing-machines, continued to represent himself to be such agent after the determination of his agency.

Injunction granted to restrain the defendant from so doing; but

Held, that no injunction could be granted to restrain the use of the words "*Wheeler & Wilson*," since they were indicative of a machine manufactured on a certain principle, whether by the plaintiffs or others.

"It seems to me that the name '*Wheeler & Wilson*' machine has come to signify the thing manufactured according to the principle of the patent. That being so, I cannot restrain anybody, after the expiration of the patent, from representing his article as being the article which was so patented. A man cannot prolong his monopoly by saying 'I have got a trade-mark in the name of a thing which was the subject of the patent.'"[1]

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323. Hudson *v.* Osborne.

November 11, 1869. *James, V. C.* — 39 *L. J. Ch.* 79; 21 *L. T. N. S.* 386.

THE plaintiffs, Hudson Brothers, having purchased the good-will, stock in trade, etc., of the business carried on at "*Osborne House*," Ludgate Hill, by the defendant George

[1] See *Singer Man. Co.* v. *Wilson*, 477.

Osborne, from his assignees in bankruptcy, the defendants, Osborne and Parker (the latter having formerly been Osborne's manager), set up in business in the Old Bailey, and styled their new establishment "*Osborne House*," and put out circulars, advertisements, etc., representing that they were carrying on the business formerly carried on by the defendant Osborne and sold to the plaintiffs.

On motion by the plaintiffs injunction granted to restrain the defendants from so doing; and

Held, that an objection that the plaintiffs were disentitled by reason of having retained on their door a brass plate bearing the defendant Osborne's name, failed.

"In substance there is no distinction between a sale by a man himself of his business and the good-will of it, and the sale by the assignees in bankruptcy of all a bankrupt's assets of every kind."

"It has been settled that there is no implied covenant of any kind in the sale by an individual himself of the good-will of his business; but it seems to be settled that a trader, whose business and the good-will of whose business have been sold by himself, or by any person deriving title under him, has no right to represent himself as carrying on that identical business; he has no right to use the trade-marks which were the marks of that business, or by the use of the name, or of a title of the firm, to represent himself as being the continuer of that identical business which was sold." [1]

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324. The Leather Cloth Company *v.* Lorsont.

November 12, 1869. *James, V. C.* — *L. R.* 9 *Eq.* 345; 39 *L. J. Ch.* 86; 21 *L. T. N. S.* 661; 18 *W. R.* 572.

SUIT for an injunction to restrain the defendant from manufacturing leather cloth in breach of contract, and from using trade-marks alleged to be similar to the plaintiffs'.

Injunction to restrain the use of the trade-marks refused, on the ground that the plaintiffs were disentitled by reason of their marks wrongfully containing the word "patent," there never having been a patent for the cloth, and there being no

[1] See *Howard* v. *Henriques*, 108.

evidence, as in *Marshall* v. *Ross*, to show that it indicated a particular kind of article; and

Held, that no costs could be given as to this part of the suit, though the defendant would have been entitled to them if he had not, as manager of the plaintiffs, been personally concerned in the adoption and wrongful use of the marks by the plaintiffs.

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325. Lee *v.* Haley.

December 9, December 18, 1869. *Malins, V. C.* — 21 *L. T. N. S.* 546; 18 *W. R.* 181. *Giffard, L. J.* — *L. R.* 5 *Ch.* 155; 39 *L. J. Ch.* 284; 22 *L. T. N. S.* 251; 18 *W. R.* 242.

THE plaintiffs being coal merchants, carrying on business at 22 Pall Mall as "*The Guinea Coal Co.*," the defendant, their former manager, set up for himself at Beaufort Buildings, Strand, as the "*Pall Mall Guinea Coal Company*," and afterwards removed to 46 Pall Mall.

On motion by the plaintiffs injunction granted to restrain the defendant from trading under that name in Pall Mall; and

Held, that defences of misrepresentation by the plaintiffs, and of sales of short weight by them, failed on the evidence, and that the plaintiffs were justified in delaying proceedings from August till November, for the purpose of obtaining evidence of actual deception.

Per Malins, V. C. (21 L. T. N. S. 547). "Put the case of a well-established shop or inn, or of a publication; directly the name is established so as to constitute a reputation, no person can adopt the same name (which, although not a copyright, is in the nature of a trade-mark), because by doing so he leads the public to believe that they are dealing with the party who has established the name, when in truth they are dealing with another person."

Per Giffard, L. J. (L. R. 5 Ch. 161). "I quite agree that the plaintiffs have no property in the name (Guinea Coal Co.), but the principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade and carries it on under a given name, that

some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."

"It is a fraud on the part of a defendant to set up a business under such a designation as is calculated to lead and does lead other people to suppose that his business is the business of another person." [1]

[1] It has been said that there is an unmistakable conflict of principle between the cases, and that, while the weight of authority is to the effect that descriptive terms cannot be protected under any circumstances, a considerable number of the later cases hold that the fact that a word is descriptive will not prevent the issuance of an injunction if there is conclusive evidence of a fraudulent purpose, and sufficient reason to presume that the public will be misled.

In *Knott* v. *Morgan*, **57** (which see), decided nearly half a century ago, it was held that the circumstance that plaintiff had not an exclusive right was of inconsiderable consequence, in view of the manifest purpose of the defendant to commit a fraud and the certainty of his succeeding. That case has been followed in a large number of decisions, and the principle on which it rests is settled beyond the possibility of disturbance. See *Williams* v. *Johnson*, **150**.

Descriptive words cannot be appropriated only because they are the common property of the public, because an exclusive right cannot be shown to exist. The deduction from the cases is, that a man may not perpetrate a fraud except by means of a descriptive word.

It is probable that the divergence toward what would seem to be the broader and better view has found expression in the cases where what may be classed as geographical names have been involved. It is obvious that a geographical name is necessarily of a descriptive nature, and that no property in it as a trade-mark can by any possibility be acquired. There are, nevertheless, a number of instances where names of this kind have been protected, notwithstanding that as applied they were as true of defendants' as of plaintiffs' goods. One of the earliest of this class is that of *Lee* v. *Haley*. It there appeared that both parties were engaged in business in Pall Mall, and that both sold coal at a guinea a ton. Notwithstanding these facts, the defendant was enjoined from using the words '*Pall Mall Guinea Coal.*" It was shown that the defendant had opened his place of business in proximity to that of plaintiffs; it is not impossible that had he gone to the other end of the street, where plaintiffs' customers were not in the habit of going to buy coal, the injunction would have been refused, and yet the words would have been neither more nor less descriptive than they were when used where they had the effect of interfering with plaintiffs' sales.

In *Wotherspoon* v. *Currie*, **329**, which arose in 1872, the plaintiff's goods had acquired reputation under the name of "*Glenfield*," and in the language of Lord Justice James, in *Thorley's Cattle Food Co.* v. *Massam*, **671**, the defendant was actually manufacturing starch at Glenfield for the purpose of enabling him to say that he was manufacturing it at Glenfield. Although the word was as true of defendant's goods as it was of plaintiff's, and a descriptive term,

326. Del Valle *v.* Mayer.

January 20, 1870. *James, V. C. — Seton, 4th ed.* 236.

INJUNCTION granted to restrain the defendant from passing into the market from the docks goods marked in imitation of the plaintiff's.

the House of Lords granted an injunction.

In *Lea* v. *Wolff*, **407**, the court said: "The defendants doubtless might, under proper circumstances, employ the name of a place where an article is manufactured, as well as the word descriptive of its character; but such words must be employed honestly and properly, and not with a design to imitate and deceive to the detriment of another. Where words or names are in common use, no one person can claim a special appropriation of them to his peculiar use; but where words, and the allocation of words, have by long use become known as designating the article of a particular manufacturer, he acquires a right to them as a trade-mark, which competing dealers cannot fraudulently invade. The essence of the wrong is the false representation and deceit. When the improper design is apparent, an injunction should be issued. . . . .

"As a general rule, geographical names cannot be appropriated as trade-marks, but the rule has its exception where the intention in the adoption of the descriptive word is not so much to indicate the place of manufacture as to intrench upon the previous use and popularity of another's trade-mark."

See *Kinney* v. *Basch*, **542**.

In *Thorley's Cattle Food case*, Lord Justice James further remarked: "The House of Lords said the mere fact that he was carrying on a manufacture at Glenfield, and was not therefore telling a lie in that respect, did not exempt him from the consequences of this, that the whole language was intended and calculated to produce on the mind of the purchasers the belief that his article was the article of the plaintiff." The opinions in the Cattle Food cases will be found to have carried the doctrine perhaps further than it had ever been carried before. The case is especially important, as it is of very recent date and decided by an appellate court.

It will be seen that the conflict between the cases illustrated by the examples which have been referred to and those in which it is held that descriptive words are necessarily *publici juris*, has been constantly assuming a more definite form; and it is certainly not improbable that what has been spoken of as the more equitable principle has been gaining ground, and will in time come to be universally recognized. The doctrine that descriptive words may be honestly applied can never be shaken; but it would seem that the natural resting-place of the now well-defined tendency, which is emphasized by the later cases, is at a point where the conclusion will be that descriptive words cannot be employed to effect a fraudulent purpose.

327. The Delaware and Hudson Canal Company *v.* Clark.

January, 1870 ; December, 1871. *U. S. C. C. S. Dt. of N. Y.* — 7 *Bl. C. C.* 112. *U. S. Sup. Ct.* — 13 *Wallace*, 311 ; 5 *Am. L. T.* 135 ; 1 *U. S. Pat. Gaz.* 279.

THE plaintiffs being dealers in coal, which they raised from the Lackawanna Valley, and called by that name, the defendant sold coal also raised in that valley, but not by the plaintiffs, as "*Lackawanna Coal.*"

Injunction to restrain the defendant from using the word "*Lackawanna*" refused, although the plaintiffs had long exclusively raised coal there and used the name, on the ground that it correctly described the origin of the defendant's coal.

Per Strong, J. (13 Wall. 323). "No one can claim protection for the exclusive use of a trade-mark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection."

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328. Milner *v.* Reed.

February 3, 1870. *Lancaster Chanc.: Wickens, V. C.* — *Bryce on Trade-Marks*, 90.

A SURGEON resident in a place called "*Oldfield Lane*," having acquired a considerable local reputation as "*The Oldfield Lane Doctor*," the plaintiff, who had been his assistant and afterwards his partner, continued to practise under the same name for some years after the death of the person to whom it was originally applied. The defendant, who had come into occupation of the premises formerly occupied by the partnership in Oldfield Lane, began to describe himself by the name of "*The Oldfield Lane Doctor.*"

Injunction granted to restrain the defendant from so doing.

329. Wotherspoon *v.* Currie.

February 25, July 5, 1870; April 18, 1872. *Malins, V. C.* — 22 *L. T. N. S.* 260; 18 *W. R.* 562. *James, L. J.* — 42 *L. J. Ch.* 130; 23 *L. T. N. S.* 443; 18 *W. R.* 942. *House of Lords.* — *L. R.* 5 *H. L.* 508; 42 *L. J. Ch.* 130; 27 *L. T. N. S.* 393.

THE plaintiffs being manufacturers of "*Glenfield Starch*," carrying on business in succession to the original makers, at first at Glenfield, afterwards at another place, the defendant obtained possession of a small plot of land at Glenfield, and began to manufacture starch and to sell it in packets on which the word "*Glenfield*" appeared in large and conspicuous letters.

Injunction granted to restrain the defendant from using the word "*Glenfield*" in connection with his starch, notwithstanding that his own name had also been placed on his packets.

Per Lord Hatherley, C. (L. R. 5 H. L. 517). "It has been long ago pointed out in decided cases that it is not upon a *mala mens* towards the first purchaser that the decision of these cases rests."

Per Lord Chelmsford (p. 519). "For the purpose of establishing a case of infringement, it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, if the resemblance is such as not only to show an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade-mark belongs."

Per Lord Westbury (p. 522). "I have no doubt that this case comes within the principle on which the jurisdiction is founded — the principle being to prevent a party from fraudulently availing himself of the trade-mark of another which has already obtained currency and value in the market, by whatever means he may devise for the purpose, provided the means are devised in order to give him a colorable title to the use of the word, and provided it be shown from the manner in which he has employed those means that his

object was from the beginning to invade the property of the appellants." [1]

330. Genin *v.* Chadsey.

New York. — *Cited*, 2 *Brewst.* 330; *R. Cox*, 567.

THE plaintiff being the proprietor of an oyster saloon, over the door of which he placed a sign bearing the words "*The Captain's Live and Let Live Oyster and Dining Saloon*," the defendants carried on the same business next door, and put up a sign with the words "*G. W. Chadsey & Co.'s Great Eastern Live and Let Live Dining Saloon.*"

Injunction granted to restrain the defendants from using the words "*Live and Let Live.*" [2]

331. The Dixon Crucible Company *v.* Guggenheim.

March, 1870. *Phila. C. P.: Paxson, J.* — 7 *Phila.* 408; 2 *Brews.* 321; 3 *Am. L. T.* 288; *R. Cox*, 559.

THE plaintiffs being makers of stove polish which they sold labelled with the words "*Stove Polish — Dixon's Prepared Carburet of Iron*," the defendants began to sell stove polish labelled "*J. C. Dixon's Stove Polish — Carburet of Iron.*"

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

"The property or right to a trade-mark may pass by an assignment, or by operation of law, to any one who takes at the same time the right to manufacture or sell the particular merchandise to which the said trade-mark has been attached. As a mere abstract right, having no reference to any particular person or property, it is conceded that it cannot exist, and so cannot pass by an assignment, or descend to a man's legal representative." [3]

[1] See *Lee* v. *Haley*, **325**.

[2] See *Howard* v. *Henriques*, **108**.

[3] See *Williams* v. *Johnson*, **150**.

332. McCartney *v.* Garnhart.

March, 1870. *Missouri Sup. Ct.* — 45 *Mo.* (4 *Post*) 593.

THE plaintiffs being whiskey manufacturers, who sold their whiskey in barrels branded with a device consisting of two anchors and the initials "*S. McC.*," the defendant began to sell whiskey in barrels branded with two picks, a pair of scales, and the words "*J. H. Garnhart's Old Bourbon.*"

Injunction to restrain the defendant from infringing the plaintiffs' rights refused, on the ground that the resemblance between the two brands was not sufficiently close to render deception probable, and that no intention to deceive was shown.

"To justify an injunction it should at least appear that the resemblance between the two brands is sufficiently close to raise the probability of mistake on the part of the public, or design and purpose to mislead and deceive on the part of the defendant."

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333. Stonebraker *v.* Stonebraker.

April, 1870. *Maryland Ct. of App.* — 33 *Md.* 252.

THE plaintiff, Henry Stonebraker, having invented and manufactured a series of medicines known as "*Stonebraker's Medicines*," the defendants, of whom two had been in partnership with the plaintiff, but had covenanted on dissolution not to imitate his medicines, etc., and another was the plaintiff's brother, began to use the brother's name, and to manufacture and sell medicines as "*Stonebraker's Medicines*," in some cases introducing the plaintiff's certificates and testimonials.

Injunction granted to restrain the defendants from imitating the plaintiff's medicines, and selling medicines under the same names, imitating the plaintiff's trade-marks, labels, etc.; and

Held, that the defendants must account for profits made on goods actually sold by them with the prohibited marks, etc., but not for goods manufactured but not sold, and not for goods forming part of the stock of the former partnership,

which the former partners retained the right to sell, under the terms of dissolution.[1]

334. Rillet *v.* Carlier.

June 6, 1870. *N. Y. Sup. Ct.* — *Pratt, J.* — 61 *Barb. S. C.* 435; 11 *Abb. Pr. N. S.* 186.

THE plaintiff manufacturing from pomegranate juice a syrup which he called "*Grenadine*" and "*Grenade Syrup*," the defendant began to sell another syrup as "*Grenade Syrup*."

Motion by the defendant to dissolve an injunction which had been granted to restrain him from selling a syrup under that name refused, on the ground that the plaintiff had acquired a right of trade-mark in the word "*Grenade*," as applied to syrup, by being the first to adopt it in America, notwithstanding that the word was an ordinary French one, signifying "*pomegranate*," and that the term "*Grenade Syrup*" was in common use in France, and notwithstanding that the defendant used the term in combination with other words.[2]

335. Gillis *v.* Hall. (1.)

July, 1870. *Phila. C. P.: Paxson, J.* — 7 *Phila.* 422; 2 *Brewster*, 342; *R. Cox*, 580.

THE defendant having sold to the plaintiff his interest in the firm of "*R. P. Hall & Co.*," and in the secret of a certain preparation called "*Hall's Vegetable Sicilian Hair Renewer*," and in the use of the name, covenanting not to use his name in the manufacture of similar articles, nor to manufacture such articles, nor to impart the secret, subsequently formed a partnership with another person under the same name of "*R. P. Hall & Co.*," and commenced to manufacture and sell the same article under the same name and with a trade-mark imitated from the plaintiff's.

Injunction granted to restrain the defendant from making

[1] See *Burgess* v. *Burgess*, 117. [2] See *Burnett* v. *Phalon*, 279.

and selling such preparations, or using his name in connection therewith, or imitating the plaintiff's labels, although liquidated damages, to be forfeited in case of breach of the contract, were specified in the contract.[1]

336. Choynski *v.* Cohen.

July, 1870. *Cal. Sup. Ct.* — 39 *Cal.* 501; 2 *Amer. Rep.* 476; *R. Cox*, 593.

THE plaintiff's place of business being styled "*The Antiquarian Book Store*," the defendant began to style his establishment "*The Antiquarian Book and Variety Store.*"

Injunction to restrain him from so doing refused, on the ground that the name was merely descriptive of the particular class of books sold, and could not be exclusively appropriated by any one.

337. Hovenden *v.* Lloyd.

July 20, 1870. *Bacon, V. C.* — 18 *W. R.* 1132.

S. LLOYD having invented a toilet preparation which he termed "*Lloyd's Euxesis*," after his death intestate, in 1854, his son, A. S. Lloyd, who had been in his employ, continued to make the article, but without taking out administration to his father. A. S. Lloyd died in 1868, and the plaintiff was the purchaser of the good-will of his business, together with what right he had to the trade-mark.

Suit for an injunction to restrain the widow of A. S. Lloyd from manufacturing the article and using the name.

Held, that A. S. Lloyd had acquired no title to the trade-mark capable of being enforced, or of being transferred to the plaintiff; and further, that if A. S. Lloyd had had any title, it would have been waived by his having taken no proceedings during a period of fifteen months preceding his death, for which time the defendant had carried on her business, and that the injunction must be refused.

[1] See *Burgess* v. *Burgess*, 117.

338. Hargreaves *v.* Smith.

August 8, 1870. *Manchester Assizes: Lush, J.*

THE plaintiffs being the executors of a bleacher, dyer, and finisher of gray cloths, whose trade-mark consisted of his arms, crest, and initials, with a scroll and a border in blue, white, and gold, the defendant began to use a trade-mark, consisting of his own arms, crest, and initials, similarly arranged and colored, before the testator's death, and continued to do so afterwards.

Action for damages.

Held, at the trial, by Lush, J., that the points for the jury were: (1.) whether the plaintiffs' trade-mark was a good one; (2.) whether the plaintiffs' trade-mark had been copied; (3.) whether the resemblance, if any, had been produced with the intention of diverting customers from the plaintiffs to the defendant.

Verdict for the plaintiffs.

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339. Candee, Swan & Co. *v.* Deere & Co.

September, 1870. *Ill. Sup. Ct.* — 54 *Ill.* 439; 5 *Amer. Rep.* 125; 4 *Am. L. T.* 266; 10 *Am. L. Reg. N. S.* 694.

THE respondents (plaintiffs) being manufacturers of ploughs at Moline, which they stamped with the words "*John Deere, Moline, Ill,*" the appellants (defendants) made ploughs at the same place and stamped them "*Candee, Swan & Co., Moline, Ill.*"

On appeal, injunction which had been granted to restrain the appellants (defendants) from using the word "*Moline*" dissolved, on the ground that the word was only indicative of the place of manufacture, to which all inhabitants of the town had an equal right; and

Held, that no exclusive right could be claimed in the letters and figures "A. No. 1," "A. X. No. 1," "No. 1," "X.

No. 1," "No. 3," and "B. No. 1," used to designate the different qualities of the ploughs.

Per Breese, J. (5 Amer. Rep. 136). "It is the actual use of the trade-mark affixed to the merchandise of the manufacturer, and this alone, which can impart to it the element of property. The mere declaration of a person, however long and however extensively published, that he claims property in a word as his trade-mark, cannot even tend to make it his property."

P. 141. "The law is well settled that no circular, price list, or advertisement, no matter how frequently repeated, can constitute a trade-mark."[1]

340. Holmes, Booth & Haydens *v.* The Holmes, Booth & Atwood Manufacturing Co.

September, 1870. *Conn. Sup. Ct.* — 37 *Conn.* 278; 9 *Amer. Rep.* 324.

HOLMES & BOOTH having been two of the principal promoters of the plaintiff corporation, established under the above name, left it and set up the defendant company under a very similar title.

Injunction granted to restrain the defendant company from using the names of Holmes & Booth.

Per Carpenter, J. "The ground on which courts of equity afford relief in this class of cases is the injury to the party aggrieved, and the imposition upon the public, by causing them to believe that the goods of one man or firm are the production of another. The existence of these consequences does not necessarily depend upon the question whether fraud or an evil intent does or does not exist. The *quo animo*, therefore, would seem to be an immaterial inquiry."

[1] The theory of plaintiffs' case was that their ploughs had acquired reputation and were known and sold as "*Moline Ploughs*," or "*The Moline Plough*;" that the term "*Moline*" was, therefore, to be regarded as their trade-mark. The court held that the word "*Moline*" being geographical, and having been used in good faith by the defendants, no relief could be granted.

See *Newman* v. *Alvord*, 282.

341. Ex parte King.

September 19, 1870. *U. S. Patent Office: Fisher, Comm. — U. S. Pat. Comm. Decis.* 1870, *p.* 109.

APPLICATION for a grant of letters patent for a design for a trade-mark refused, on the ground that, since the U. S. Statute of 1870, the only proper statutory mode of obtaining the exclusive use of a trade-mark was by procuring its registration under that act as a trade-mark, and not by patenting it as a design, or otherwise.

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342. In re English.

November 2, 1870. *U. S. Patent Office: Fisher, Comm. — U. S. Pat. Comm. Decis.* 1870, *p.* 142.

ON an application for the registration of certain trade-marks on brooms, of which one consisted of the words and letters "*R. W. English's X Broom, Buffalo, N. Y. Order English's X Brooms*," and the others were the same, except that the X was changed into XX and XXX:

Held, (1.) that the fact that X and XX had been used as descriptive of quality in the liquor trade did not disqualify those symbols from being arbitrarily adopted as trade-marks in an entirely different trade, and that the trade-marks must be admitted to registration; (2.) that a separate application must be made for the registration of each separate variation in the label by the addition of an X, the X, XX, etc., being in each case a mere arbitrary symbol.[1]

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342. Nixey *v.* Roffey.

November 14, 1870. *Malins, V. C. — W. N.* 1870, *p.* 227.

THE plaintiff being a manufacturer of black lead, which he sold under special labels, on which he was described as "*Manufacturer and Patentee*," though he had taken out no

[1] See *Lawrence, &c. Co.* v. *Lowell Hosiery Mills*, 676.

patent for the article in question, the defendant sold other black lead under similar labels.

Suit for an injunction to restrain the defendant from imitating the plaintiff's labels.

An injunction having been granted on motion by the plaintiff, and the defendant having since ceased to use the labels, and sold his business:

Held, on motion for decree, that the plaintiff's use of the words "*Manufacturer and Patentee*" was equivalent to his describing his article as "*patent*," and that this being incorrect, the bill must be dismissed without costs.[1]

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344. Lazenby *v.* White. (1.)

November 18, 1870; January 16, 1871. *Lord Romilly, M. R.* — *Cited L. R.* 11 *Eq.* 448; 49 *L. J. Ch.* 576; 24 *L. T. N. S.* 380; 19 *W. R.* 595; *Seton, 4th ed.* 237. *James and Mellish, L. JJ.* — 41 *L. J. Ch.* 354.

THE plaintiffs being the successors in business of the inventor of "*Harvey's Sauce*," that name having become open to the use of all manufacturers of the sauce, the defendant began to sell a sauce under the name of "*The Original Lazenby's Harvey's Sauce.*"

Injunction granted to restrain the defendant from so doing; and

Held, that a defence that the plaintiffs were disentitled by reason of their own delay failed.

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345. Clowes *v.* Hogg.

December 17, 1870; February 17, 1871. *Malins, V. C.* — *W. N.* 1870, *p.* 268; *L. J. Notes of Cases*, 1870, *p.* 267. *James and Mellish, L. JJ.* — *W. N.* 1871, *p.* 40.

THE plaintiffs being the proprietors of a magazine called *London Society*, the defendant, who had formerly owned the magazine, and had, on mortgaging it to another firm, covenanted to do nothing to injure it, began to publish a maga-

[1] See *Pidding* v. *How*, 60.

zine which he called *English Society*, in a cover calculated to induce the belief that it was a substitute for or continuation of *London Society*.

On motion by the plaintiffs, injunction granted to restrain the defendant from so doing.

On appeal, the defendant having in the mean time adopted a new style of cover to which the plaintiffs did not object: *Held*, that the injunction must be dissolved, the defendant undertaking to use the new cover until the hearing.[1]

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346. Lazenby *v.* White. (2.)

December 22, 1870. *James, L. J.* — *L. R.* 6 *Ch.* 89; 19 *W. R.* 291.

On motion by the defendant, his appeal against the injunction which had been granted to restrain him from selling his sauce under the name of "*The Original Lazenby's Harvey's Sauce*," advanced to the head of the list of appeals for the next term, on the ground of the irreparable damage which would be occasioned to the defendant by the continuance of the injunction.

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347. Graham *v.* Plate.

January, 1871. *Cal. Sup. Ct.* — 40 *Cal.* 593; 6 *Amer. Rep.* 639; 4 *Am. L. T.* 75.

In an action to recover damages for an infringement by the defendant of the trade-mark of Henry Derringer, of whose estate the plaintiff was administrator, the whole profits made by the defendant by the sale of the spuriously marked goods were awarded as damages.

Held, on appeal, that the damages were not excessive.

Per Crockett, J. "Every consideration of reason, justice, and sound policy demands that one who fraudulently uses the trade-mark of another should not be allowed to shield himself from liability for the profit he has made by the use of the trade-mark, on the plea that it is impossible to determine how much of the profit is due to the trade-mark, and how much to the intrinsic value of the commodity.

[1] See *Hogg* v. *Kirby*, 10.

The fact that it is impossible to apportion the profit renders it just that he should lose the whole." [1]

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348. Ellis *v.* Zeilen & Co.

January, 1871. *Georgia Sup. Ct.* — 42 *Ga.* 91.

THE plaintiffs (defendants in error) having purchased a medicine called "*Dr. Simmons' Liver Regulator or Medicine*," the defendants (plaintiffs in error) began to sell a medicine of their own as "*Dr. A. Q. Simmons' Genuine Liver Medicine.*"

Suit for an injunction to restrain the defendants from using similar packages and wrappers to the plaintiffs'.

Demurrer by the defendants overruled, on the ground that, although the trade-marks did not appear so similar as to be likely to deceive, it must be assumed from the pleadings, for the purpose of the demurrer, that the defendants had acted with a view "to take advantage of the reputation" of the plaintiffs; and

Held, that another ground of demurrer, that the plaintiffs' medicine was a quack remedy and a deceit upon the public, failed, on the principle that in such cases the court would only adjudicate between the conflicting claims of the parties, and not with a view to the guardianship of the public with respect to the qualities of nostrums, except where injury to the public health or morals was to be apprehended.

[1] There is a conflict between the cases as to the proper measure of damage for the infringement of a trade-mark. It has been held in many instances that the profits of the defendant is the true measure, and in others that the profits which would have been realized by the plaintiff, had he sold the quantity of goods shown to have been sold by the defendant, is the proper estimate of his loss. Perhaps the most authoritative decision on the subject is *Faber* v. *Hovey*, 481, decided by the General Term of the Supreme Court of New York, and affirmed on appeal by a divided court, in which the latter rule was applied, although the mark involved was of a strictly technical nature.

In contemplation of law the effect of the defendant's course is to divert the plaintiff's trade. The theory is that each package bearing the fraudulent mark has been bought as and for a package of plaintiff's goods. Why, then, is not the measure of damage what the plaintiff would have made had he sold what constructively he would have sold had he been permitted to enjoy his legal right?

349. R. *v.* Ardley.

January 31, 1871. *C. C. R.*—*L. R.* 1 *C. C. R.* 301; 12 *Cox*, 23; 40 *L. J. M. C.* 85; 24 *L. T. N. S.* 193; 19 *W. R.* 478.

ON an indictment for obtaining money by false pretences, the prisoner having induced the prosecutor to purchase a gold chain spuriously stamped "15 ct." on every link, in imitation of the hall-mark, on a representation that it was made of 15 carat gold, and that the mark was genuine:

Held, that the conviction was right and must be affirmed, on the ground that the prisoner's statement was not mere exaggerated commendation of the article of which he wished to dispose, but a deliberate misstatement of what was not a matter of opinion, but a matter of fact.

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350. Shipwright *v.* Clements.

February 20, 1871. *Malins, V. C.*—19 *W. R.* 599.

THE defendant, having been in partnership with the plaintiff as perfumers, assigned to the plaintiff, on the dissolution of the partnership, all his interest in the partnership premises and effects, without specifically referring to the good-will or trade-marks, and covenanted not to interfere with the plaintiff, but he nevertheless subsequently represented that the old business had been removed to his new premises, and sold a perfume called "*The Zingari Bouquet*" under the name and mark which the partnership had used for it.

Injunction granted to restrain the defendant from infringing the plaintiff's rights, but on account of the smallness of the amount no account given.

"The sale of a business is a sale of the good-will. It is not necessary that the word 'good-will' should be mentioned. The defendant sold the business, and with it everything producing profit. . . . . In the sale of a business a trade-mark passes, whether specially mentioned or not."

351. Cocks *v.* Chandler.

March 3, 1871. *Lord Romilly, M. R.* — *L. R.* 11 *Eq.* 446; 40 *L. J. Ch.* 575; 24 *L. T. N. S.* 379; 19 *W. R.* 593.

THE plaintiff being the successor in business of the inventor of "*Reading Sauce*," the defendant began to sell a sauce under the name of "*The Original Reading Sauce.*"

Injunction granted to restrain the defendant from so doing.

"Where there are a great number of persons who produce the same article, 'original' means that the article so called is that made by the first inventor. That is the meaning of the word 'original' which the Court of Chancery has always recognized."[1]

352. Rodgers *v.* Philp.

1871. *Columbia Sup. Ct.: Wylie, J.* — 1 *U. S. Pat. Gaz.* 29.

THE plaintiffs being a firm of Sheffield cutlers, who stamped their cutlery with the name "*Rodgers*," or "*Rodgers & Sons*," or "*J. Rodgers & Sons*," together with a star and Maltese cross, the defendants sold other cutlery marked with "*Rogers & Son*," and the same symbols, alleging that such cutlery had been manufactured by a German firm, and sold, so marked, for twenty-five years.

On motion by the plaintiffs for an injunction to restrain the defendants from so doing:

Held, (1.) that the marks on the defendants' goods, though not identical with those on the plaintiffs', constituted an infringement of the plaintiffs' rights; (2.) that a license from the King of Prussia to the German manufacturers to use the fraudulent marks, if it existed, could be no defence; (3.) that the plaintiffs were not disentitled by reason of not having registered their trade-marks in America, under the U. S. Statute of 1870, since registration was not made obligatory; (4.) but that the plaintiffs were disentitled to an injunction at all events as regarded innocent purchasers of goods spuriously

[1] See *Brown* v. *Freeman*, 230.

marked, by a delay of twenty-five years in arresting the infringement, and that the motion must therefore be refused.[1]

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353. Gillis *v.* Hall. (2.)

1871. *Phila. C. P.: Paxson, J.* — 8 *Phila.* 231; 3 *Brews.* 509; *R. Cox*, 596.

THE defendant, having been restrained by injunction from using the names "*Hall*," "*R. P. Hall*," etc., in connection with a preparation called "*Hall's Vegetable Sicilian Hair Renewer*," sold an article which he styled "*R. P. Hall's improved preparation for the hair*," and enclosed it in wrappers containing a statement that the preparation was entirely different from "*Hall's Vegetable Sicilian Hair Renewer*," but was compounded by the same inventor, *R. P. Hall.*

Attachment issued against the defendant for contempt.

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354. The Congress and Empire Spring Co. *v.* The High Rock Congress Spring Co.

April, 1871. *N. Y. Sup. Ct.* — 57 *Barb.* 526; *R. Cox*, 599. *N. Y. Ct. of App.* — 45 *N. Y.* (6 *Hand*) 291; 10 *Abb. Pr. N. S.* 348; 6 *Amer. Rep.* 82; 4 *Am. L. T.* 168; *R. Cox*, 624.

THE plaintiffs, being the purchasers of the "*Congress Spring*" at Saratoga, continued, as their predecessors had long done, to sell the medicinal water from the spring as "*Congress Water*," and in bottles and cases so labelled. The defendants began to use the name "*Congress*" in their corporate name and in connection with their water from another spring.

On appeal from an order dissolving an injunction which had been granted, on motion by the plaintiffs, to restrain the defendants from so doing:

Held, (1.) that the exclusive owner of a natural spring had a right to designate the water of the spring by a trade-mark exclusively his own; (2.) that the purchase of the spring

[1] Upon a hearing on the merits, an injunction was granted. See *McLean* v. *Fleming*, 580.

conveyed to the plaintiffs the right to the name and mark which their predecessors had used; and therefore (3.) that a new trial must be granted.

Per Folger, J. (R. Cox, 626). "It is held that the right of property in a trade-mark can be said to exist only, and can be tested only, by its violation. But its violation is when one adopts or imitates, and applies to an article of his manufacture, the name or mark previously used by another as a designation for his production. The wrong done is the sale by the first of his goods as and for the goods of the last. The violation and the wrong are the same, whether the commodity is one which the hand of man has made, or which nature has put into the hand of man, — certainly so, if into the hand of but one man has it been put. It is a matter of property, and the profitable use of property."

P. 630. "A property in trade-mark may be obtained by transfer from him who has made the primary acquisition, though it is essential that the transferee should be possessed of the right either to manufacture or sell the merchandise to which the trade-mark has been attached. And it may also pass by operation of law to any one who at the same time takes that right."

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355. Faber *v.* D'Utassey.

April, 1871. *N. Y. Super. Ct.: Brady, J.* — 11 *Abb. Pr. N. S.* 399.

ACTION for damages for an infringement by the defendants of the plaintiff's trade-mark.

On motion for judgment against one of the defendants, on his answer, by which he denied any knowledge of the plaintiff's ownership, or any intention to do wrong, and alleged that only a single sale of the article wrongly marked had occurred, and that to the plaintiff or his agent:

Held, that such answer was not frivolous, since, even if the statements made afforded no defence, they were at all events important on the question of damages, and that the motion must be refused.

356. Carver *v.* Pinto Leite.

April 15, November 21, 1871. *Lancaster Chanc.: Wickens, V. C. — L. R.* 7 *Ch.* 92; 41 *L. J. Ch.* 93; 25 *L. T. N. S.* 724; 20 *W. R.* 135. *James and Mellish, L. JJ. — L. R.* 7 *Ch.* 90; 41 *L. J. Ch.* 92; 25 *L. T. N. S.* 722; 20 *W. R.* 134.

THE defendants, being commission agents, exported to Portugal cotton goods having the plaintiffs' trade-marks impressed upon them.

Suit for an injunction to restrain the defendants from so doing. An order having been made for the production of documents by the defendants, the defendants sealed up parts of various books and documents, and objected to disclose them. *Held*, on appeal, that they were not bound to disclose the names of their customers, or the prices at which the goods were bought or sold by them, or the names or addresses of any persons to or from whom any letters produced were written or received (with a specified exception); but that they must disclose the places to which they exported the marked goods, the names and addresses of the writers or recipients of the excepted letters, the marks in connection with which the alleged spurious marks had been used, and the directions given to the defendants with respect to those marks.

Per James, L. J. "In such cases it is important to consider whether the discovery is material for the purpose of enabling the plaintiff to establish his case at the hearing, or material only for the subsequent purposes of the suit, in case the plaintiff should succeed. I am not at all disposed to grant discovery when I am satisfied that it is likely to be injurious to the defendant, and am not satisfied that there is any real prospect of its being of material service to the plaintiff at the hearing."

357. In re Hauthaway. (1.)

April 24, 1871. *U. S. Patent Office: Leggett, Comm. — U. S. Pat. Comm. Decis.* 1871, *p.* 97.

APPLICATION to register the words "*Beeswax Oil*" as a trade-mark refused, on the ground that the words were purely descriptive of the substance and qualities of the article.

358. In re Porter Blanchard's Sons.

April 24, 1871. *U. S. Patent Office: Leggett, Comm. — U. S. Pat. Comm. Decis.* 1871, *p.* 97.

THE words "*The Blanchard Churn*" admitted to registration as a trade-mark on churns, on the ground that such a phrase was capable of constituting a good trade-mark previously to the U. S. Statute of 1870, and that the phrase was also not obnoxious to the clause in that statute by which "the name of a person, firm, or corporation only, unaccompanied by a mark sufficient to distinguish it from the same name when used by other persons," was refused registration, since other words were coupled with the name.

359. In re Roberts. (1.)

April 24, 1871. *U. S. Patent Office: Leggett, Comm. — U. S. Pat. Comm. Decis.* 1871, *p.* 113.

THE words, "A luxury. R. J. Roberts' Razor-steel Scissors. The best in the world. The best is the cheapest. For sale here," admitted to registration as a trade-mark.

360. In re Roberts. (2.)

April 25, 1871. *U. S. Patent Office: Leggett, Comm. — U. S. Pat. Comm. Decis.* 1871, *p.* 100.

THE words, "An exquisite pleasure to shave with R. J. Roberts' Diamond-edged Razors," admitted to registration as a trade-mark.

361. In re Roberts. (3.)

April 25, 1871. *U. S. Patent Office: Leggett, Comm. — U. S. Pat. Comm. Decis.* 1871, *p.* 101.

THE words "R. J. Roberts' Diamond-edge Razor. Every razor warranted," admitted to registration as a trade-mark.

362. In re Roberts. (4.)

May 17, 1871. *U. S. Patent Office: Leggett, Comm. — U. S. Pat. Comm. Decis.* 1871, *p.* 100.

APPLICATION for the registration of the words "*Razor-steel*" as a trade-mark, in respect of cutlery, refused, on the ground that the words were purely descriptive of the substance and qualities of the article.

363. Gray *v.* Koch.

1871. *Michigan C. C: Sutherland, J.* — 2 *Mich. N. P.* 119.

THE plaintiff having begun to style his establishment for the sale of ready-made clothes "*The Mammoth Wardrobe*," and having placed those words over his door, and advertised them, but always in connection with his name and address, the defendant, who kept an establishment next door to the plaintiff's, placed the same words over his shop.

Motion by the plaintiff for an injunction to restrain the defendant from allowing those words to remain refused, on the ground that the words in question were descriptive of an establishment of the kind, and were truthfully used by the defendant; and that, further, the different names used in connection with those words would probably suffice to prevent deception.

"The plaintiff has no right to appropriate a sign or symbol which, from the nature of the fact it is meant to signify, others may employ with equal truth for the same purpose. Names having a definite and established meaning in the language, and which do not indicate ownership or origin, or something equivalent, cannot be appropriated

by one so as to exclude a similar use by others. No property can be acquired in words or marks which do not denote the goods or property, or peculiar place of business of a person."[1]

364. The Alleghany Fertilizer Co. *v.* Woodside.

1871. *U. S. C. C. Dt. of Md.: Giles, J.* — 1 *Hughes*, 115.

THE plaintiff company manufacturing, at Boston, an agricultural compost, under the name of "*Eureka Ammoniated Bone Superphosphate of Lime*," the defendants, a Baltimore firm, who had been the plaintiffs' agents, began to sell another article as "*Baltimore 'Eureka' Ammoniated Bone Superphosphate of Lime.*"

Injunction granted to restrain the defendants from infringing the plaintiffs' rights, on the ground that the word "*Eureka*" was a valid trade-mark, though the remaining descriptive words could not be exclusively appropriated.

"The natural or proper designation of an article can never become a trade-mark, because anybody making the article has a right to call it by its proper name. But a purely arbitrary or fanciful appellation, for the first time used to distinguish an article to which it has no natural or necessary relation, does, by virtue of that very appropriation and subsequent use, become a trade-mark."

365. Gardner *v.* Bailey.

1871. *U. S. C. C. Dt. of Penn.* — *Codd. Dig.* 131.

THE plaintiffs being owners of certain mills called "*The Stark Mills*," and manufacturers there of seamless bags, on which they placed the word "*Stark*" over a semicircular arch, with the letter "A" beneath, the defendants made and sold similar goods, similarly marked, except that they substituted the word "*Star*" for "*Stark.*"

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

[1] See *Howard* v. *Henriques*, 108.

366. Hostetter *v.* Vowinkle.

1871. *U. S. C. C. Dt. of Neb.: Dillon and Dundy, JJ.* — 1 *Dill.* 329.

THE plaintiffs being manufacturers of "*Hostetter's Celebrated Stomach Bitters*," which they sold in bottles labelled with that name, directions for use, a device of St. George and the Dragon, a likeness of the inventor, and a fac-simile signature "*Hostetter & Smith*," the defendants began to sell other bitters under the plaintiffs' label without alteration, but afterwards changed "*Hostetter*" to "*Holsteter*," and "*Hostetter & Smith*" to "*Holsteter & Smyte*."

Injunction granted to restrain the defendants from infringing the plaintiffs' rights, and damages assessed at the amount of profits which the plaintiffs would have made, if they had sold the same quantity of their cordial as the defendants had sold of theirs under the spurious label.

367. Sohl *v.* Geisendorf.

1871. *Indianapolis Super. Ct.: Rand, J.* — 1 *Wilson (Ind.)*, 60.

THE plaintiffs being flour dealers, the defendants sold flour under similar trade-marks.

On motion by the plaintiffs injunction granted to restrain the defendants from infringing the plaintiffs' rights; and

Held, (1.) that the fact that the plaintiffs had purchased part of their trade-mark and invented the rest did not interfere with their exclusive right; (2.) that an abandonment of their mark by the plaintiffs was not proved by the fact that some isolated features of their mark had been used by others; (3.) that the fact that the mark to some extent indicated quality did not disentitle the plaintiffs; (4.) that the defendants could derive no title under a sale from one of the persons who had previously sold to the plaintiffs.

"If the two marks were seen at different times or places, a majority of purchasers would not distinguish the one from the other, unless their attention was specially called to the difference. If such be the

case, the law is well settled that the defendants' trade-mark is an infringement of the plaintiffs', even if the marks, side by side, would not mislead."

368. Reeves *v.* Denicke.

June, 1871. *N. Y. Super. Ct. : Monell, J.* — 12 *Abb. Pr. N. S.* 92.

THE plaintiffs trading as "*E. H. Reeves & Co.*," the principal partner being "*E. H. Reeves*," the defendants, who had formerly been in partnership with E. H. Reeves, as "*E. H. Reeves & Co.*," and to whom E. H. Reeves had assigned his interest in the property of that partnership, traded under the name of "*Robert C. Reeves, successor to E. H. Reeves & Co.*"

Injunction granted and continued to restrain the defendants from continuing to use the name "*E. H. Reeves & Co.*," even in that combination.

369. Upmann *v.* Elkan.

June 5, December 5, 1871. *Lord Romilly, M. R.* — *L. R.* 12 *Eq.* 140 ; 40 *L. J. Ch.* 475; 24 *L. T. N. S.* 896 ; 19 *W. R.* 867. *Lord Hatherley, C.* — *L. R.* 7 *Ch.* 130 ; 41 *L. J. Ch.* 246 ; 25 *L. T. N. S.* 813 ; 20 *W. R.* 131.

THE plaintiffs, being cigar manufacturers in Cuba, discovered that boxes of spurious cigars, bearing their marks, had arrived in the St. Katharine Docks, and were entered in the names of the defendants, Messrs. Elkan, forwarding agents.

Suit for an injunction to restrain those defendants from dealing with the boxes of cigars in question, and from infringing their trade-marks.

Held, (1.) that the defendants, Messrs. Elkan, were not protected from the injunction by the fact that they did not deal in the goods, but only acted as forwarding agents ; (2.) that, on their undertaking to give immediate notice of fresh consignments of marked cigars, they should not have to pay the plaintiffs' costs, since they had offered to give what information they could, had not participated in the fraud, and had

submitted to act as the court should direct; (3.) that they were not entitled to receive their costs from the plaintiffs, not having submitted unconditionally; (4.) that innocent consignees of the goods spuriously marked were entitled to the costs occasioned by their being made parties to the suit; (5.) that those consignees must pay their own costs of the appeal, having appeared, though informed that no alteration in the order as affecting them would be asked; (6.) that the Dock Company who held the goods in the name of Messrs. Elkan were entitled to their costs; (7.) that the consignors should be at liberty to intervene, and that, if they did not do so, the spurious marks should be erased, and the plaintiffs should have a lien on the cigars for their costs and the costs of the Dock Company.

Per M. R. "It is his duty (*i. e.* the duty of the person in whose name the Dock Company hold the goods spuriously marked) at once to give all the information required, and to undertake that the goods shall not be removed or dealt with until the spurious brand has been removed, and to offer to give all facilities to the person injured for that purpose. If, after that, the person injured files a bill, though he will be entitled to all that he asks in the shape of relief, as he might have got it all without suit, he will not get from such defendants the costs of the suit, and he may have to pay them. I do not mean by this to lay down that the plaintiff — by which I mean the person whose trade-mark is fraudulently imitated — may not file a bill without making any inquiry at all."

370. The Anglo-Swiss Condensed Milk Co. *v.* The Swiss Condensed Milk Co.

July 6, 1871. *Malins, V. C.* — *W. N.* 1871, *p.* 163; *L. J. Notes of Cases*, 1871, *p.* 154.

THE plaintiffs selling their condensed milk in tins bearing labels with the figure of a milk-maid, with a medal on either side, the defendants began to sell milk in tins labelled with the figure of a milkman, with the arms of Switzerland in a medallion on either side, and having other particulars imitated from the plaintiffs' labels.

On motion by the plaintiffs injunction granted to restrain the defendants from infringing the plaintiffs' rights; but the plaintiffs not having taken any proceedings on hearing of the arrival of the first small consignment, but having waited for the arrival of a larger quantity before doing so, the injunction not to extend to the milk already arrived and warehoused in London.

"It is not necessary, in order to enable the court to interfere, that there shall be absolute identity; but there certainly is so close a resemblance between the two as to deceive an ordinary purchaser."

371. In re The Dutcher Temple Co.

September 21, 1871. *U. S. Patent Office: Leggett, Comm. — U. S. Pat. Comm. Decis.* 1871, *p.* 248.

THE letter "*D.*" enclosed within a lozenge, admitted to registration as a trade-mark on loom temples, on the ground that it was sufficiently distinctive of the origin of the goods, and was not descriptive of kind or quality.

372. Wilder *v.* Wilder.

Kentucky Chancery. — Cited 2 *Sawyer*, 78–89.

INJUNCTION granted to restrain the defendants from selling a compound under the name of "*J. B. Wilder & Co.'s Stomach Bitters*," and from imitating the bottles in which the plaintiff's compound was contained, or the labels affixed to them.

373. Moorman *v.* Hoge.

October, 1871. *U. S. C. C. Dt. of Cal.: Sawyer, J.* — 2 *Sawyer*, 78; 4 *Am. L. T.* 217; 6 *Am. L. Rev.* 365.

THE plaintiffs being whiskey manufacturers, who sold their article in a barrel of peculiar dimensions, which had acquired the name of "*The Cutter Barrel*," after the plaintiffs' predecessor in business, and which, together with the brands impressed upon it, had been duly registered as a trade-mark

in the U. S. Registry, the defendants acted as agents for the sale of whiskey contained in barrels of similar dimensions, but having entirely different brands.

Injunction to restrain the defendants from infringing the plaintiffs' rights refused, on the ground that (1.) a certificate by the commissioner of patents, of registration as a trade-mark, did not preclude the court from considering whether a mark placed on the registry was a good one or not; (2.) that a barrel of peculiar dimensions could not become a trade-mark, to be protected irrespective of the brands on it, although if the brands were partially imitated, an imitation of the peculiar barrel would be an element in deciding the question of fraudulent intention.

"I find no case where the use of a package of peculiar form and dimensions has been restrained, without having imprinted upon, or connected with it, some other symbol, word, letter, or form, adopted as a trade-mark."[1]

[1] The question considered in this case was whether a barrel of a particular kind could be protected as a trade-mark; it is similar to *Harrington* v. *Libby*, 538, which see.

The court said: "Complainants do not claim that there is any infringement upon that part of what they claim to be their trade-mark, which consists of the words and devices stamped upon the barrel. The claim is that there is an infringement by the use of the barrel only.

"Is the plaintiff entitled to the exclusive use of a barrel of this peculiar form, construction, and capacity, without regard to any mark or device impressed upon, or connected with it? Can a barrel of this description be appropriated as a trade-mark, or substantive part of a trade-mark, so as to exclude the rest of the world from using it in the same branch of business? . . . . The use of the barrel with a simulation of the complainant's trade-mark impressed upon it would, doubtless, be restrained. But to extend the privilege of trade-mark to the barrel in question alone, without having impressed upon, or in any way connected with it, any of the other words, symbols, or devices claimed and used by the complainants as a part of their trade-mark, or any colorable imitation of it, would, in my judgment, be to go further than any case heretofore decided, and extend the privileges of trade-mark to subjects not recognized by any established legal principles applicable to the subject. After a careful examination of the question, my conclusion is, that the barrel in question, without any other marks or symbols, is not, and that it cannot become, a lawful trade-mark, or a substantive or integral part of a lawful trade-mark, and that complainants have no exclusive right to its use as such."

374. Seltzer *v.* Powell.

November, 1871. *Phila. C. P.: Paxson, J.* — 8 *Phila.* 296.

THE plaintiffs having manufactured whiskey, and sold it as "*Silver Grove*" whiskey, since 1867, though it did not appear that the name was generally known, the defendant began in 1870 to sell whiskey under the name of "*Silver Brook*" whiskey.

On motion by the defendant, injunction which had been granted to restrain him from using those words dissolved, on the ground that the prior appropriation by the plaintiffs was not sufficiently clearly made out, and that they must establish their claim at law before they could obtain an injunction.

375. In re Francis & Mallon.

November 8, 1871. *U. S. Patent Office: Leggett, Comm.* — *U. S. Pat. Comm. Decis.* 1871, *p.* 283.

THE word "*Beaverine*" admitted to registration as a trade-mark on boots and shoes made partly of beaver cloth and partly of leather, on the ground that, though the word was suggestive of the material of which the article was in part made, it was not a word known to the language and in common use, but a fancy word newly coined for the purpose of being used on the applicants' goods.

376. In re Blakeslee & Co.

November 15, 1871. *U. S. Patent Office: Leggett, Comm.* — *U. S. Pat. Comm. Decis.* 1871, *p.* 284.

APPLICATION for registration of the words and letters "*Cundurango Ointment, C. O.*," as a trade-mark, in respect of ointment containing cundurango, a South American plant, refused, on the ground that the words were descriptive of the article, and that the letters did not add the requisite distinctiveness.

377. In re Hauthaway. (2.)

November 15, 1871. *U. S. Patent Office: Leggett, Comm. — U. S. Pat. Comm. Decis.* 1871, *p.* 284.

AN application to register the words "*Beeswax Oil*" as a trade-mark having been refused on the ground of their being merely descriptive [*In re Hauthaway.* (1.)]:

Motion to reopen the case, on the ground that the practice of the office had been changed since that decision, refused; and

Held, that there was no change in the practice.

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378. In re Palmer.

November 16, 1871. *U. S. Patent Office: Leggett, Comm. — U. S. Pat. Comm. Decis.* 1871, *p.* 289.

APPLICATION for the registration of the word "*Invisible*" as a trade-mark, in respect of packets of face powder, refused, on the ground that, though the word might be a trade-mark if used in a non-natural sense, yet, when applied to face powder, it was merely indicative of a quality of the article.

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379. Abbott *v.* The Bakers' and Confectioners' Tea Association, Limited.

November 16, 1871; February 8, 1872. *Malins, V. C. — W. N.* 1871, *p.* 207; *L. J. Notes of Cases*, 1871, *p.* 199. *Lord Hatherley, C. — W. N.* 1872, *p.* 31.

THE plaintiffs being tea merchants, the defendants sold tea in wrappers similar to those in which the plaintiffs' tea was sold, the general appearance being imitated, though the details differed.

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

Per V. C. (L. J. N. of C. 1871, p. 199). "The rule of the court is that a man who has adopted a distinguishing mark has a right to be protected against any other person adopting one sufficiently like it to mislead an unwary public."

Per L. C. (W. N. 1872, p. 31). "Though no one particular mark is exactly imitated, the combination is very similar and likely to deceive. It is true that there is no proof that any one has been deceived, or that the plaintiffs have incurred any loss; but where the similarity is obvious that is not of importance." [1]

380. In re Whyte.

November 28, 1871. *U. S. Patent Office: Duncan, Act. Comm.— U. S. Pat. Comm. Decis.* 1871, *p.* 304.

APPLICATION for letters patent for a device described by the applicant as an "ornamental print for fabrics" refused, on the ground that the real intention of the applicant was to use the device by way of a trade-mark, and that this being so, he must apply for its registration as a trade-mark, and not for letters patent for it as a design.

381. Isaacson *v.* Thompson.

December 6, 1871. *Bacon, V. C.* — 41 *L. J. Ch.* 101; 20 *W. R.* 196.

THE plaintiff trading as a milliner under the name of "*Madame Louise*," the defendant began to use on his shops the names of "*Agnes Ellis*" and "*E. Louise*," under the pretence that they were his daughters' names.

Motion by the plaintiff for an injunction to restrain the defendant from using those names, or otherwise causing his shops to be mistaken for the plaintiff's, refused, on the ground that the plaintiff had delayed moving for nine or ten months after he had obtained sufficient evidence of actual deception.

"It is one of the most wholesome rules that a person who comes for the extraordinary relief of an injunction should come speedily."

382. Ex parte Dawes & Fanning.

1871. *U. S. Patent Office: Leggett, Comm.* — 1 *U. S. Pat. Gaz.* 27.

ON an application to register a trade-mark for use on umbrellas, consisting of the number "*140*":

[1] See *Williams* v. *Johnson*, 150.

Held, that the number was a good trade-mark within the U. S. Statute of 1870, as consisting of an arbitrarily selected combination of numerals, and not used in its ordinary signification, and registration granted.

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383. Bond *v.* Milbourn.

December 20, 1871. *Bacon, V. C.* — 20 *W. R.* 197.

PARTNERSHIP suit.

The plaintiff and defendant having carried on business in partnership under the style of "*James Milbourn & Co.*," and the plaintiff having bought the interest of the defendant in the partnership, under a provision in the articles, the defendant set up business next door, and employed his former workmen, and used the former style, so as to render the good-will purchased by the plaintiff valueless.

Held, that the plaintiff was not entitled to have the premium he had paid on originally entering the partnership returned to him, since "*Milbourn*" was the defendant's own name, which he had a right to use in his business, and there was no provision in the articles for a return of premium.

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384. Ford *v.* Foster.

January 18, June 11, 1872. *Bacon, V. C.* — *L. R.* 7 *Ch.* 616 ; 27 *L. T. N. S.* 220 ; 20 *W. R.* 311. *James and Mellish, L. JJ.* — *L. R.* 7 *Ch.* 611; 41 *L. J. Ch.* 682; 27 *L. T. N. S.* 219; 20 *W. R.* 818.

THE plaintiff being the manufacturer of "*Ford's Eureka Shirt*," which he marked "*R. Ford's Eureka Shirt, London*," the defendants sold other shirts as "*The Eureka Shirt*," and marked with those words.

Injunction granted, on appeal, to restrain the defendants from using the name "*Eureka*" upon any shirts not of the plaintiff's make, but the injunction not to extend to advertisements between the defendants and the trade ; and

Held, (1.) that the fact that the plaintiff had habitually used his own name with the fancy name did not deprive him of his

remedy; (2.) that the name in question was not proved to have become *publici juris;* (3.) that the plaintiff was not disentitled by reason of having called himself "patentee" in his advertisements, the misrepresentation being, at most, collateral; (4.) that the plaintiff not having been active in defending his rights, and the defendants' business and connection being much larger than his, so as to make it impossible to calculate the sales lost to the plaintiff by those effected by the defendants, the account should be granted only from the filing of the bill.

Per Mellish, L. J. "What is the test by which a decision is to be arrived at whether a word which was originally a trade-mark has become *publici juris?* I think the test must be whether the use of it by other persons is still calculated to deceive the public; whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade-mark as if they were his goods."

385. Labouchere *v.* Dawson.

January 18, 1872. *Lord Romilly, M. R.*—*L. R.* 13 *Eq.* 322; 41 *L. J. Ch.* 427; 25 *L. T. N. S.* 894; 20 *W. R.* 309.

THE plaintiffs having purchased a brewery business, the defendant, being one of the vendors, set up in business in another place, and solicited his former customers to deal with him and not with the plaintiffs, so as to destroy the value of the business he had sold.

On motion by the plaintiffs injunction granted to restrain the defendant from so doing.

"The good-will is the probability of the old customers going to the new firm to whom the business is sold."

"The new firm, the defendant in this case, is entitled to publish any advertisement he pleases in the papers, stating that he is carrying on such business. He is entitled to publish any circulars to all the world to say that he is carrying on such a business, but he is not entitled, either by private letter, or by a visit, or by his traveller or agent, to go to any person who was a customer of the old firm and solicit him not to continue his business with the old firm, but to trans-

fer it to him, the new firm. That is not a fair and reasonable thing to do after he has sold the good-will."

386. Rowland *v.* Breidenbach.

Lord Romilly, M. R. — Cited 1 *Trade-Marks*, 261.

THE plaintiff being the manufacturer of Rowland's "*Macassar*" Oil, the defendant began to manufacture and sell another article under the name of "*Macassarine.*"

Injunction to restrain the defendant from so doing refused, on the ground that the name of the plaintiff's article was descriptive.

387. Weed *v.* Peterson.

February, 1872. *N. Y. Sup. Ct.: Learned, J.* — 12 *Abb. Pr. N. S.* 178.

THE plaintiffs having succeeded to the business of "*D. Simmons & Co.*," and having acquired the right to use that name and the name "*D. Simmons*" alone as their trade-mark, the defendants used the name "*D. Simmons*" on their goods, having received the stamps and labels from their predecessors in business who had wrongfully used the same.

Action for an injunction to restrain the defendants from so doing.

Held, (1.) that the plaintiffs were entitled to an injunction to restrain the defendants from using the name, notwithstanding that the latter had acted in ignorance of the plaintiffs' rights, and had since discontinued their business altogether, and that costs must be given; (2.) but that the plaintiffs were not entitled to recover damages from the defendants, since they had acted perfectly *bonâ fide.*

388. James *v.* James.

February 23, 1872. *Lord Romilly, M. R.* — *L. R.* 13 *Eq.* 421; 41 *L. J. Ch.* 353; 26 *L. T. N. S.* 568; 20 *W. R.* 434.

THE plaintiffs being persons entitled, under an assignment by Robert James, the original inventor, to an ointment known

as "*Lieutenant James' Horse Blister*," the defendant, Robert Joseph James, began to sell an ointment under the same name, with the signature "*Robert James*," and a statement that it alone was genuine.

Injunction granted to restrain the defendant from omitting the name Joseph from his signature, and from stating that his ointment alone was genuine; but

Held, that the defendant could not be restrained from using the name "*Lieutenant James' Horse Blister*," that having become the name by which the article was known, and the defendant not having come into possession of the secret recipe by a breach of trust or fraud.

"When a person has discovered a valuable invention, and has not patented it, any one who has discovered the ingredients (I am not talking of the case of a breach of trust, or of fraud, or the like) may sell those ingredients, and may use the name of the person who has discovered them after his death, but not in his lifetime, so as to suggest that they are made by him." [1]

389. Green *v.* Rooke.

February 23, 1872. *Wickens, V. C.— W. N.* 1872, *p.* 49; *L. J. Notes of Cases*, 1872, *p.* 54.

THE plaintiff being the proprietor of an ointment known as "*Dr. Johnson's*" or "*Singleton's Golden Ointment*," the recipe of which had been invented by one Dr. Johnson in the seventeenth century, and had long been in the possession of the Singleton family, the defendant began to sell an ointment under the name of "*Dr. Rooke's Golden Ointment.*"

Motion by the plaintiff for an injunction to restrain the defendant from selling any ointment under the name "*Golden Ointment*" refused, on the ground that, although persons were not at liberty to sell "*Singleton's Ointment*," there was no law to prevent the sale of "*Golden Ointment*" by those who could discover its composition.[2]

[1] See *Thorley's Cattle Food Co.* v. *Massam*, 671.

[2] See *Singleton* v. *Bolton*, 4.

390. Wolfe *v.* Barnett.

February, 1872. *Sup. Ct. of Louisiana.*— 24 *La. Ann.* 97; 13 *Amer. Rep.* 111.

THE plaintiff making and selling "*Wolfe's Aromatic Schiedam Schnapps*," the defendants sold other spirits under the same name.

Injunction granted to restrain the defendants from so doing, with damages; and

Held, that the following defences failed: (1.) that the defendants had used their mark for ten years; (2.) that the plaintiff was not the first manufacturer of the article; (3.) that the separate words used by the plaintiff were not new, the combination being so; (4.) that the defendants had a written permission from a Mr. Wolfe, not being the plaintiff, to use his name; (5.) that the plaintiff's label, which he stated to be copyright, did not show the date of entry.

391. Hallett *v.* Cumston.

March, 1872. *Mass. Sup. Ct.* — 110 *Mass.* (14 *Browne*) 29.

THE plaintiff having been in partnership with the defendant's father as "*Hallett & Cumston*," and having, on the termination of the partnership, entered into the latter's service under an agreement by which the latter was to have the use of the plaintiff's name during the continuance of the agreement, the defendant continued, after his father's death, to carry on his father's business under the old name, and on the plaintiff withdrawing his permission to use his name, obtained the use of the name of another person of the same name.

Injunction to restrain the defendant from using the name "*Hallett*" or "*Hallett & Cumston*" refused, on the ground that (1.) the plaintiff had no interest in the name or trademark of "*Hallett & Cumston;*" (2.) as to the name Hallett, although the defendant could not use the plaintiff's name with-

out his consent, that did not prevent him from using the name of another person, though the same.

392. Blackwell *v.* Armistead.

March, 1872. *U. S. C. C. W. Dt. of Va.: Rives, J.* — 5 *Am. L. T.* 85; *Browne on Trade-Marks*, 510.

THE plaintiffs being manufacturers of tobacco at Durham, North Carolina, who used as their trade-mark a side view of a bull, with the words "*Genuine Durham Smoking Tobacco*," the defendant also manufactured tobacco, and sold it with labels containing the figure of a bull's head, with the words "*The Durham Smoking Tobacco*."

Injunction granted to restrain the defendant from infringing the plaintiff's rights.[1]

393. Scott *v.* Rowland.

March 16, 1872. *Wickens, V. C.* — 26 *L. T. N. S.* 391; 20 *W. R.* 508.

THE plaintiff having been in partnership with the defendant as glass-stainers, under the name of "*John Scott & Co.*," and having been bought out by the latter, the defendant continued to trade under the old name of "*John Scott & Co.*"

On motion by the plaintiff injunction granted to restrain the defendant from using the plaintiff's name in connection with his business, so as to represent that the plaintiff was a partner in his business, on the ground that the retention of the name of an outgoing partner, who survived the dissolution of partnership, in the firm name of the business, might to some extent render him responsible for the liabilities of the concern.

394. Morrison *v.* Case.

April, 1872. *U. S. C. C. Dt. of Conn.: Shipman, J.* — 9 *Bl. C. C.* 548; 2 *U. S. Pat. Gaz.* 544.

THE plaintiff being the proprietor of certain trade-marks registered under the United States Act of 1870, and consist-

[1] See *Blackwell* v. *Wright*, 466.

ing respectively of the words "*The Star Shirt*," the words "*The Star Shirt*" together with the figure of a star, and the words and device "*The * Shirt*," the defendant sold other shirts under the same marks.

Suit for an injunction to restrain the defendant from infringing the plaintiff's trade-marks.

Held, that the marks in question were lawful trade-marks within the act, and that the injunction must be granted.

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395. Cook *v.* Starkweather.

1872. *N. Y. Sup. Ct.: Monell, J.* — 13 *Abb. Pr. N. S.* 392.

THE plaintiffs being whiskey manufacturers who sold their whiskey in barrels branded with the words "*Valley Whiskey*" or "*Old Valley Whiskey*," the letters "*AAA*," and a Maltese cross, the head of the barrel being glazed in a particular manner and the rim painted red, the defendants sold other whiskey in barrels similarly prepared and branded, except that the letters "*XXX*" and a crown were substituted for the letters "*AAA*" and the cross.

Action for an injunction to restrain the defendants from infringing the plaintiffs' rights.

Held, that, whether the plaintiffs were or were not entitled to the exclusive use of the words "*Valley Whiskey*" or "*Old Valley Whiskey*," which was not clearly established, the course of conduct adopted by the defendants was intended and calculated to deceive, and the plaintiffs were therefore entitled to an injunction.

"The package, case, or vessel in which the commodity is put, if prepared in a peculiar or novel manner, though in itself, perhaps, not a trade-mark, may very properly be a very important part of it; and where a peculiar device is applied to a box or barrel which has been especially prepared to receive and give prominence to the design, such specially prepared box or barrel constitutes a part of the trade-mark, and may participate in the protection which will be given to the trade-mark itself."

"The rule is, that the imitation of a trade-mark need not be exact

and perfect. It may embrace variations that a comparison would instantly disclose. Yet, if a resemblance exists which was designed to mislead the public, its use may be restrained." [1]

396. Winsor *v.* Clyde.
Stetson *v.* Winsor.

May 21, 1872. *Phila. C. P.* — 9 *Phila.* 513.

CROSS motions for injunctions.

Held, (1.) that Stetson & Co., who carried on business as shippers of merchandise by ships which they did not own, but of which they had the entire management while loading and unloading, etc., and who denominated each line of vessels used by them, and plying in a particular direction, by the name "*The Keystone Line for* ——," had acquired a right of property in the name; (2.) that Winsor and Harding, who had owned the steamships employed for a certain period on one of these lines, had acquired no right in the name by its application to their ships, but had at most been entitled to use the name under a revocable license; (3.) that an injunction must be granted to restrain Winsor and Harding from continuing to use the name after the termination of their connection with Stetson & Co., and that their motion for an injunction must be refused.

397. Radde *v.* Norman.

May 30, 1872. *Wickens, V. C.* — *L. R.* 14 *Eq.* 348; 41 *L. J. Ch.* 525; 26 *L. T. N. S.* 788; 20 *W. R.* 766.

THE plaintiff being entitled to the exclusive right of importing from the Leopoldshall mines in Anhalt a kind of rock salt called "*Kainit*," and who designated it "*The Genuine Leopoldshall Kainit*," the defendants sold another article, not being the article which the plaintiff had the exclusive right of exporting, under the name of "*Kainit* [*Leopoldsalt*]."

On motion by the plaintiff injunction granted to restrain the defendants from infringing his rights.[2]

[1] See *Williams* v. *Johnson*, 150.

[2] See *Congress, &c. Spring Co.* v. *High Rock Congress Spring Co.*, 354.

398. Hookham *v.* Pottage.

June 7, November 12, 1872. *Malins, V. C.* — *L. R.* 8 *Ch.* 93 *n.*; 26 *L. T. N. S.* 755; 20 *W. R.* 720. *James and Mellish, L. JJ.* — *L. R.* 8 *Ch.* 91; 27 *L. T. N. S.* 595; 21 *W. R.* 47.

THE plaintiff, defendant, and defendant's brother having been in partnership as tailors, under the name of "*Hookham and E. & S. Pottage*," on the dissolution of that partnership the plaintiff was held by the Court of Chancery to be entitled to continue in possession of the business, the defendant receiving the value of his interest; and the plaintiff continued to trade under the new name of "*Hookham & Co.*" The defendant subsequently set up in business within a few doors of the plaintiff, and placed over his shop the words "*S. Pottage, from Hookham and Pottage*," the words "*from*" and "*and*" being in small letters.

Injunction granted to restrain the defendant from using the plaintiff's name in such a manner as to deceive, on the ground that, although the defendant was entitled to state fairly his connection with the former firm, he was not entitled to act so as to divert to himself custom intended for the plaintiff.[1]

399. Armistead *v.* Blackwell.

June 14, 1872. *U. S. Patent Office : Leggett, Comm.* — 1 *U. S. Pat. Gaz.* 603; *Browne on Trade-Marks*, 495.

BLACKWELL (who manufactured tobacco at Durham, N. C., in succession to Green, who had begun to designate his tobacco as "*Durham*" tobacco in 1865) having obtained registration of a trade-mark consisting of the words "*Durham Smoking Tobacco, Manufactured by W. T. Blackwell, Durham, North Carolina*," Armistead, who manufactured tobacco at Lynchburg, Va., applied for the registration in his name of the words "*Durham Smoking Tobacco.*" His business was carried on in succession to W. A. Wright, who had in 1860, when in partnership with Morris as "Morris & Wright,"

[1] See *Colton* v. *Thomas*, **305**.

begun to designate his tobacco made at Durham as "*Best Spanish-Flavored Durham Smoking Tobacco*," but had dissolved partnership with Morris in 1861, and after a few months longer discontinued manufacturing altogether till 1869, when he again began to prepare tobacco for the market.

Interference declared for the purpose of determining to which, if either, the words "*Durham Smoking Tobacco*" belonged.

Held, (1.) that, to be entitled to claim the benefit of the prior user of Morris & Wright, Armistead should show that he claimed through Morris as well as through Wright; (2.) that, at all events, the user by his predecessor was longer than that by Blackwell's predecessor; (3.) but that the words were not registrable as a trade-mark, and that Blackwell had obtained registration by error, since a geographical name could not constitute a trade-mark capable of becoming the exclusive property of any one person, but must remain open to the use of all inhabitants of the town or district, although strangers might be enjoined against the use of it; (4.) and that the fact that Blackwell had obtained a wrongful registration of the words mentioned, which could not be cancelled, could not entitle Armistead to a similar wrongful registration, and that his application must be refused.[1]

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400. Hirst *v.* Denham.

June 20, 1872. *Bacon, V. C.* — *L. R.* 14 *Eq.* 542; 41 *L. J. Ch.* 752; 27 *L. T. N. S.* 56.

THE plaintiff being a manufacturer of woollen cloths, who had invented and adopted certain new fancy patterns and named them respectively "*Turin*," "*Sefton*," "*Leopold*," "*Liverpool*," the defendants, one of whom had been in the plaintiff's service, began to use the same names on tickets resembling the plaintiff's affixed to cloths of their own make of a similar pattern to the plaintiff's, but of inferior quality.

On motion by the plaintiff injunction granted to restrain the defendants from describing their cloths by those names,

[1] See *Newman* v. *Alvord*, 282.

and from placing them on tickets affixed to their cloths, imitating the plaintiff's tickets, etc.[1]

401. Smith *v.* Reynolds. (1.)

June, 1872. *U. S. C. C. S. Dt. of N. Y.: Blatchford, J.* — 10 *Bl. C. C.* 85; 3 *U. S. Pat. Gaz.* 213.

SUIT for an injunction to restrain the infringement of the plaintiffs' trade-mark, registered under the U. S. Act of 1870.

Injunction refused, on the ground that there was no sufficient evidence of the filing at the Patent Office of a declaration under oath as to the right to the mark, as required by the act, the only evidence produced being a certificate by the commissioner of patents of the registration of the trade-mark, of the filing of a statement in respect of the mark, and that the registrant had otherwise complied with the act, etc., but which certificate did not refer to any such declaration as was required.

402. Smith *v.* Reynolds. (2.)

July, 1872. *U. S. C. C. S. Dt. of N. Y.: Blatchford, J.* — 10 *Bl. C. C.* 100; 3 *U. S. Pat. Gaz.* 214.

THE plaintiffs being paint manufacturers, who had registered as their trade-mark on paints, under the U. S. Act of 1870, a device of a crown, but who had not actually used it on white lead, the defendants, who, or their predecessors in business, had used a device of a crown on white lead previously to the use and registration of the device by the plaintiffs', continued so to do.

On motion by the plaintiffs for an injunction to restrain the defendants from so doing:

Held, (1.) that the registration of the device in the name of the firm, and not in the names of the individual partners, was good; (2.) that the registration for paints generally was

[1] It appears that the circumstance that some of these words were geographical names was not considered.

good, without further description of the particular goods; (3.) that the device of a crown was a good registrable trade-mark within the act; (4.) but that the prior use of the device on white lead by the defendants prevented the plaintiffs from having a right to register the mark in respect of white lead, and that the registration, being bad in respect of part of the class it purported to cover, was bad altogether; (5.) that the motion for injunction must be refused.

403. Mack *v.* Petter.

July 23, 1872. *Lord Romilly, M. R.* — *L. R.* 14 *Eq.* 431; 41 *L. J. Ch.* 781; 20 *W. R.* 964.

THE plaintiff being the proprietor and publisher of "*The Birthday Scripture Text-Book*," the defendants brought out a book of similar arrangement and style, under the name of "*The Children's Birthday Text-Book*."

Injunction granted to restrain the defendants from publishing any book with that title, or any other title calculated to deceive, and from imitating the arrangement, binding, etc., of the plaintiff's book in such a way as to deceive.[1]

404. In re Johnson & Co.

September 12, 1872. *U. S. Patent Office: Thacher, Act. Comm.* — 2 *U. S. Pat. Gaz.* 315.

APPLICATION for the registration of two trade-marks, consisting respectively of the words and letters "*Parsons' Purgative Pills, P. P. P.*," and "*Johnson's American Anodyne Liniment, Established* A. D. *1810*," refused, on the ground that both designations were descriptive of the article; the letters "*P. P. P.*" becoming so when used in combination with the words of which they were the initials, though, if used alone, they might have acquired an arbitrary signification; and the date of discovery in the second case not supplying the needed distinctiveness.

[1] See *Hogg* v. *Kirby*, 10.

405. In re Tolle.

October 3, 1872. *U. S. Patent Office: Thacher, Act. Comm.* — 2 *U. S. Pat. Gaz.* 415.

APPLICATION for the registration of two trade-marks for flour, consisting of the words "*Cherry St. Mills*," in the one case, and "*Market St. Mills*" in the other, combined in both cases with the masonic emblem of the square and compass, refused, on the ground that as to the name of the locality no exclusive right could be acquired; and as to the emblem, it could not be divested of its universal signification and be exclusively appropriated in a particular business; and that, as to the whole, a combination of two objectionable parts could not constitute a valid trade-mark.

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406. The McGowan Bros. Pump Machine Co. *v.* McGowan.

October, 1872. *Cincinnati Super. Ct.* — 2 *Cinc.* 313.

THE defendant in error, J. H. McGowan, having been in partnership with his brother, T. J. McGowan, as machine manufacturers, sold his interest in the partnership to his brother, reserving the right to manufacture under the partnership patents. The notice of dissolution of partnership stated that T. J. McGowan was to use the firm name "in settlement," and to carry on business "under the old style firm name." T. J. McGowan, having joined with other persons, incorporated a company under the name "*The McGowan Bros. Pump and Machine Co.*," being the plaintiffs in error. J. H. McGowan, the defendant in error, recommenced business under the name of "*John H. McGowan & Co.*," at "*The McGowan Engine and Pump Company's Works.*"

Action by the defendant in error.

Injunction granted to restrain the plaintiffs in error from the use of the words "*The McGowan Brothers*" as part of their name, except on patterns sold by J. H. to T. J. Mc-

Gowan, and castings therefrom, on the ground that, although the good-will of the partnership business passed to T. J. McGowan, he had only a revocable license to use the name, and that the continued user by him was injurious to, and objected to by, the defendant in error. But the plaintiffs in error to be at liberty to style themselves "*Successors to the McGowan Brothers.*"

Per Hagans, J. "There can be no doubt that, where one partner sells to another partner a going business, every advantage arising from the fact of the sole ownership of the premises, stock, and establishment, including advantages acquired by the old firm in carrying on its business, whether connected with the old place or the old name, passes to the purchaser. But the vendor will not be prevented from carrying on a similar business when, where, or with whom he pleases."

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407. Lea *v.* Wolff.

November, 1872; October, 1873. *N. Y. Sup. Ct.: Ingraham, P. J.* — 13 *Abb. Pr. N. S.* 389; 1 *Thomp. & C.* 626. *N. Y. Sup. Ct.* — 1 *Thomp. & C.* 626; 15 *Abb. Pr. N. S.* 1; 46 *How. Pr.* 157; 1 *Am. L. T. N. S.* 400.

THE plaintiffs being manufacturers in Worcestershire of a sauce which they called "*Worcestershire Sauce*," the defendants began to manufacture a sauce elsewhere, which they called by the same name, and placed on their bottles labels very closely resembling those of the plaintiffs, except that their own names appeared as those of the manufacturers.

On motion by the plaintiffs for an injunction to restrain the defendants from using the name and labels:

Held, by Ingraham, P. J.: (1.) that the name, being the name of the locality in which the sauce was made, could not be protected as a trade-mark; (2.) but that an injunction must be granted to restrain the imitation of the labels.

Held, by the General Term of the Supreme Court, that the injunction must be extended to restrain the use of the name "*Worcestershire Sauce*," since it was evident that the defend-

ants had acted with fraudulent intention, and they, further, did not manufacture within the county in question.

Per Fancher, J. "Where words or names are in common use, no one person can claim a special appropriation of them to his peculiar use; but where words and the allocation of words have, by long use, become known as designating the article of a particular manufacturer, he acquires a right to them as a trade-mark, which competing dealers cannot fraudulently invade. The essence of the wrong is the false representation and deceit. When the improper design is apparent an injunction should be issued."

"As a general rule, geographical names cannot be appropriated as trade-marks; but the rule has its exception, where the intention in the adoption of the descriptive word is not so much to indicate the place of manufacture as to encroach upon the previous use and popularity of another's trade-mark." [1]

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408. Sohier *v.* Johnson.

November, 1872. *Mass. Sup. Ct.* —111 *Mass.* (15 *Browne*) 238.

W. P. WINCHESTER, surviving partner in the firm of "*E. A. & W. Winchester*," whose trade-mark consisted of that firm name, having taken the defendant into partnership, and died, and the defendant having subsequently continued to trade under and use that name, for some years in partnership with others, and afterwards by himself, the plaintiffs, being W. P. Winchester's executors and trustees, sold the factory and premises to a third person.

Suit for an injunction to restrain the defendant from using the trade-mark, and an order for him to join in conveying it to the purchaser from the plaintiffs.

Held, that the trade-mark had become the property of the partnership between W. P. Winchester and the defendant, on its formation, and had descended to the defendant on the death of the former, and that the plaintiffs had no right therein, and that the injunction and order must be refused.

"The trade-mark is the device or symbol used to identify the ar-

[1] See *Lee* v. *Haley*, 325; *Lea* v. *Miller*, 513.

ticle manufactured, and the right to use it will pass with the business and good-will as an incident, unless something appears to show a different intention of the parties."

409. The Meriden Britannia Co. *v.* Parker.

November, 1872. *Conn. Sup. Ct.* — 39 *Conn.* 450; 12 *Amer. Rep.* 401; 13 *Am. L. Reg. N. S.* 153.

THE plaintiff having acquired from three brothers named Rogers the right to use a trade-mark, "*1847, Rogers Bros., A 1,*" and the brothers Rogers being employed by them to superintend the manufacture of the goods so stamped, the defendant began to place on similar goods stamps containing the words "*C. Rogers Bros., A 1,*" and "*C. Rogers & Bros., A 1.*"

Injunction granted to restrain the defendant from using such stamps or any other stamp containing the words "*Rogers Bros.,*" though he had used his stamps by the permission of three brothers of the name of Rogers.

But *Held*, that no injunction could be granted as to the name "*Rogers*" alone, nor with respect to goods already stamped by the defendant, the parties being left to their remedy at law as to the last point.

Held, also, that the fact that the goods bearing the trade-mark were not actually made by persons whose names were Rogers was not such a misrepresentation as disentitled plaintiff to be heard in a court of equity.

Per Carpenter, J. "The fact that careful buyers who scrutinize trade-marks closely are not deceived does not materially affect the question. It only shows that the injury is less, not that there is no injury."[1]

[1] *Burgess* v. *Burgess*, 117; *Pidding* v. *How*, 60.

410. Osgood *v.* Allen.

November, 1872. *U. S. C. C. Dt. of Maine : Shepley, J.* — 1 *Holmes*, 185; 6 *Am. L. T.* 20; 3 *U. S. Pat. Gaz.* 124.

THE plaintiffs being the proprietors and publishers of a monthly magazine for the young, published at Boston, Mass., under the title "*Our Young Folks; an Illustrated Magazine for Boys and Girls*," the defendant began to advertise and publish and sell at Augusta, Maine, a fortnightly illustrated paper for the young, under the title "*Our Young Folks' Illustrated Paper.*" [1]

Suit for an injunction to restrain the defendant from using the words "*Our Young Folks*" as the title of a publication.[2]

Held, (1.) that the title of a copyrighted publication was not capable of protection as copyright, except in conjunction with the publication which it was used to designate, and that the copyright in the paper not having been infringed, that in the title had not been; (2.) that, treating the title on principles applicable to trade-marks, the case must be referred to a master to report whether the use of the title by the defendant was deceiving, or was calculated to deceive the public.[3]

"Words or devices may be adopted as trade-marks, which are not original inventions of the one who adopts and uses them. Words in common use may be adopted, if, at the time of adoption, they were not used to designate the same or similar articles of production. A generic name, or a name merely descriptive of an article of trade, or its qualities or ingredients, cannot be adopted as a trade-mark, so as to give a right to the exclusive use of it. The office of a trade-mark is to point distinctively to the origin or ownership of the article to which it is affixed. Marks which only indicate the names or qualities of products cannot become the subjects of exclusive use, for, from the nature of the case, any other producer may employ, with equal truth and the same right, the same marks for like products. Geo-

[1] This case is not to be taken as of force in disturbing the well settled doctrine that the name of a periodical is, *primâ facie*, a trade-mark.

[2] See *Hogg* v. *Kirby*, 10.

[3] See *Jollie* v. *Jaques*, 105.

graphical names, which point out only the place of production, and not the producer, cannot be appropriated exclusively, so as to prevent others from using them and selling articles produced in the districts they describe under these appellations."

411. Broadhurst *v.* Barlow.

November 21, 1872. *Wickens, V. C. — W. N.* 1872, *p.* 212; *L. J. Notes of Cases,* 1872, *p.* 183.

THE plaintiffs being manufacturers of Spanish shirtings for export to the East, who marked their goods with a lion in a scroll, the words "*Spanish Shirtings*" in a scroll, the figures "*No. 120*," certain lines, and the words "*exactly 12 yards*," in Turkish, Armenian, and Greek, the defendants used on their goods an elephant and castle in place of a lion, and curved instead of straight lines, the marks being in other respects the same.

On motion by the plaintiffs injunction granted to restrain the defendants from using the words "*exactly 12 yards*" in the same languages as the plaintiffs used, and placed between a figure or crest and the words "*Spanish Shirtings*" in a scroll, in a manner similar to that used by the plaintiffs.

And *Held*, that an offer to submit and abandon the mark objected to did not deprive the plaintiffs of their right to the injunction.[1]

412. In re Graham.

November 30, 1872. *U. S. Patent Office: Thacher, Act. Comm.* — 2 *U. S. Pat. Gaz.* 618.

APPLICATION for the registration of the words "*The New Manny*," as a trade-mark for a harvesting machine, refused, on the ground that the term "*the Manny*" was commonly applied to a large class of machines, that the word "*new*" was practically equivalent to "*improved*," and that the words, therefore, merely constituted a descriptive appellation of the article.

[1] See *Millington* v. *Fox*, 63.

413. The Singer Manufacturing Co. *v.* Kimball and Morton.

January 14, 1873. *Ct. of Session.* — *Ct. of Sess. Cas.* 3*d Ser. XI.* 267; 10 *Scot. L. Rep.* 173.

THE plaintiffs being American manufacturers of the "*Singer*" sewing-machines, the defendants advertised machines for sale as "*Singer*" machines, but placed their own names, as those of the makers, on all of them.

Interdict granted to restrain the defendants from using the name "*Singer*" in respect of machines other than those made by the plaintiffs, on the ground that the name was indicative of machines of the plaintiffs' make, and not of machines made according to a certain principle of construction.

Per Lord President Inglis. "Whether it be a star, or any other device, or a name, as in the present case, the result is the same. If it be exclusively appropriated for a series of years, and has obtained a certain exclusive meaning in the trade, as signifying the goods or the productions of a particular manufacturer, then it is his property as a trade-mark, and no one else is entitled to use it."

"In an application for an interdict it is not only not necessary to prove any pecuniary damage, but it is not necessary to prove that any injury has been actually inflicted. A threat of injury is a sufficient ground for an application for an interdict, and in like manner a reasonable apprehension of injury from the proceedings of the parties complained against is also in many circumstances a very good ground for such an application."

Per Lord Ardmillan. "Singer & Co. have no monopoly of the invention, and no exclusive right to make or to sell the machine. Any one may make it, any one may sell it. But there must be no deception, no sailing under false colors, no unfair and delusive assumption of a trade-mark, or of a name appropriated and known as a trade-mark." [1]

[1] See *Singer Man. Co.* v. *Wilson*, 477.

414. Christie *v.* Christie.

January 15, March 20, 1873. *Malins, V. C.* — 42 *L. J. Ch.* 261; *L. R.* 8 *Ch.* 502 *n. Lord Selborne, C. and Mellish, L. J.* — *L. R.* 8 *Ch.* 499; 42 *L. J. Ch.* 544; 28 *L. T. N. S.* 607; 21 *W. R.* 493.

THE plaintiffs being Messrs. Christie, Manson & Woods, auctioneers, the defendants issued a certain prospectus in which they styled themselves "*Messrs. Christie & Christie*," and made preparations for carrying on business under the name of "*Christie & Co.*"

Suit by the plaintiffs for an injunction to restrain the defendants from so doing. Exceptions for scandal to a statement in the bill, to the effect that one of the defendants had, on a previous occasion, been brought up in a police court on a charge of fraud.

Held, on appeal, that the exceptions must be allowed, on the ground that such a charge of fraud, even if it could be substantiated, was wholly immaterial to the suit in question, and that its insertion in the bill was not only scandalous but oppressive.

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415. Burke *v.* Cassin.

January, 1873. *Cal. Sup. Ct.* — 45 *Cal.* 467; 13 *Amer. Rep.* 204.

THE plaintiff being the executor of Udolpho Wolfe, who manufactured and sold "*Wolfe's Aromatic Schiedam Schnapps*," the defendants sold other spirits under the name of "*Von Wolf's*," or "*Van Wolf's Aromatic Schiedam Schnapps.*"

Injunction granted to restrain the defendants from using the name "*Wolfe*," or "*Wolf*," or "*Von Wolf*," or "*Van Wolf*," but not from using the words "*Aromatic Schiedam Schnapps*," those words being descriptive of the article.

416. In re Richardson.

February 7, 1873. *U. S. Patent Office: Leggett, Comm.* — 3 *U. S. Pat. Gaz.* 120.

APPLICATION for the registration of the words "*A. Richardson's Patent Union Leather-Splitting Machine*" as a trade-mark refused, as to the word "*patent*," on the ground that, the patent having expired, the continued use of the word was deceptive; and, as to the remainder, on the ground that the name, having been applied to a patented article during the existence of the patent, had become descriptive of the article, and open to the use of the public on the expiration of the patent.[1]

417. Sternberger *v.* Thalheimer.

February 8, 1873. *U. S. Patent Office: Thacher, Act. Comm.* — 3 *U. S. Pat. Gaz.* 120.

THALHEIMER having in five or six instances used the word "*Centennial*," as an experimental trade-mark on clothing, about March 6, 1872, and procured the registration of the word as his trade-mark, but not having used the word seriously until June, Sternberger, in February, 1872, registered a trade-mark containing that word, with other particulars, began to use the word extensively about March 12, 1872, and applied for registration of the word as his trade-mark.

Interference declared between the parties.

Held, that, notwithstanding the prior registration of Thalheimer, Sternberger was entitled to registration, since he was the first to use the word seriously, besides having previously registered it in combination with other particulars.

[1] The decision here, as in other cases, is made to rest upon conclusions of fact. See *Pidding* v. *How*, 60.

418. Laird *v.* Wilder.

February, 1873. *Kentucky Ct. of App.* — 2 *Bush*, 131 ; 15 *Amer. Rep.* 707.

THE plaintiff manufacturing and selling "*Laird's Bloom of Youth or Liquid Pearl*," the defendants began to sell another preparation in bottles of a similar shape to the plaintiff's, and with labels copied in all particulars from his, except that for "*George W. Laird, No. 74 Fulton Street, New York*," were substituted the words, "*Joseph Laird, No. 384 Broadway, New York.*"

Injunction to restrain the defendants from so doing refused, on the ground that the plaintiff's preparation contained carbonate of lead, or other noxious ingredients, whereas he described it as being "free from all mineral and poisonous substances," and that he was, therefore, disentitled to relief.[1]

419. Tudor *v.* Tudor.

March 13, 1873. *Malins, V. C.* — *W. N.* 1873, *p.* 72.

THE plaintiff, W. Tudor, having transferred a business, which he had carried on in partnership with his brother S. Tudor, during the latter's lifetime, and since his death, alone, under the name of "*S. & W. Tudor*," to the defendants, the sons of S. Tudor, the defendants continued to use the plaintiff's initial "*W.*" as part of their firm name, notwithstanding that there was an express provision in the deed under which the plaintiff retired for the removal of his name from the business.

On motion by the plaintiff injunction granted to restrain the defendants from continuing so to do.

[1] See *Pidding* v. *How*, 60.

420. Corns *v.* Griffiths.

May 3, 1873. *Malins, V. C.* — *W. N.* 1873, *p.* 93 ; *Pemberton, 2d ed.* 308.

THE plaintiffs being the proprietors of a weekly newspaper entitled *The Iron Trade Circular* (*Rylands'*), the defendant, who had for many years published a weekly report of the iron trade, not in the form of a newspaper, as *The Iron Trade* (*Griffiths' Weekly Report*), substituted for this report a newspaper much resembling the plaintiffs', and entitled *The Iron Trade Circular* (*Edited by Samuel Griffiths*).

On motion by the plaintiffs injunction granted to restrain the defendant from using a title for his newly established newspaper identical with that used by the plaintiffs for theirs.[1]

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421. Fullwood *v.* Fullwood. (1.)

May 5, July 31, 1873. *Malins, V. C.* — *W. N.* 1873, *p.* 93. *James and Mellish, L. JJ.* — *W. N.* 1873, *p.* 185.

THE plaintiff being a manufacturer of annatto, trading as "*R. J. Fullwood & Co.*," and who sold his annatto in earthenware bottles, with special labels on the sides, the defendant, H. Fullwood, the plaintiff's nephew, began to manufacture annatto under the name of "*H. Fullwood & Co.*," though he had no partner, and removed into the same street as the plaintiff, and sold his goods in similar bottles, similarly labelled to the plaintiff's, as to which several instances of actual deception were proved.

On motion by the plaintiff, injunction granted to restrain the defendant from selling his annatto in similar bottles labelled in a similar manner to the plaintiff's.

[1] See *Hogg* v. *Kirby*, 10.

422. In re The American Sardine Co.

May 13, 1873. *U. S. Patent Office: Leggett, Comm.* — 3 *U. S. Pat. Gaz.* 495.

APPLICATION for registration of the words "*American Sardines*" as a trade-mark on boxes containing a species of American fish, not the true sardines, refused, on the ground that the application of the words to fish, not being really sardines, was calculated to deceive purchasers, while, if applied to true sardines, the words would be properly descriptive of the fish.[1]

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423. Witt *v.* Corcoran.

June 13, 1873. *Bacon, V. C.* — *Seton, 4th ed.* 257; 2 *Ch. D.* 69; 45 *L. J. Ch.* 603; 34 *L. T. N. S.* 550; 24 *W. R.* 501.

THE plaintiff having been in partnership with the defendant and his son, under the firm of "*Bryan Corcoran, Witt & Co.*," and having purchased the business, good-will, trade names, trade-marks, etc., the defendant carried on business under the name of "*Bryan Corcoran & Co.*," or "*Bryan Corcoran, Son & Co.*"

Injunction granted to restrain the defendant from carrying on business under those names, or any other name calculated to induce the belief that the defendant was carrying on business in succession to the original firm, and from interfering with letters intended for the original firm.

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424. Browne *v.* Freeman. (2.)

July 23, 1873. *James and Mellish, L. JJ.* — *W. N.* 1873, *p.* 178.

THE plaintiff being the original inventor of chlorodyne, but who had lost his exclusive right in the name, the defendant represented that a medicine of his own manufacture was the "*True and Original Chlorodyne*," and made certain other representations with regard to his chlorodyne.

Injunction to restrain the defendant from so doing refused,

[1] See *Pidding* v. *How*, 60.

on the ground that the name had become the name of the article; that the defendant had always sold his under his own name, and that any false statements in the defendant's advertisements only amounted to slander, for which damages were the proper remedy.[1]

425. Popham *v.* Wilcox. (Afterwards Popham *v.* Cole.)

1873; December 9, 1874; April 25, 1876. *N. Y. Super. Ct.: Monell, J.* — 14 *Abb. Pr. N. S.* 206. *N. Y. Super. Ct.* — 38 *N. Y. Super. Ct.* (6 *J. & S.*) 274. *N. Y. Ct. of App.* — 66 *N. Y.* (21 *Sickels*) 69; 23 *Amer. Rep.* 22.

THE plaintiff being a manufacturer of refined lard, which he sold in vessels stamped with the figure of a fat hog, his name, and "*Prime Leaf Lard*," the defendants began to sell the same article in vessels stamped with a globe, a small wild boar, their name, and "*Prime Leaf Lard*."

Action for an injunction to restrain the defendants from infringing the plaintiff's rights.

Held, by Monell, J., that although there was not much similarity between the marks when seen side by side, the defendants' mark was likely to attract to itself the same name as the plaintiff's, namely, "*the pig brand*," and that, therefore, the injunction which had been granted must be continued.

Held, by the General Term of the N. Y. Superior Court, that the plaintiff being unable to prove himself to have been the first inventor, and it being proved that the pig mark had been used by various other refiners, the injunction must be dissolved.

Held, by the N. Y. Ct. of App., that the decision in favor of the defendants must be maintained, on the ground that there was not sufficient resemblance between the marks to be calculated to deceive; and, further, that it was doubtful whether the figure of the animal from which the lard was derived was not descriptive of the article, and, therefore, incapable of being appropriated.

[1] See *Cocks* v. *Chandler*, 351.

Per Monell, J. "The question in these cases always is, whether there is such a similarity of the two devices as to deceive the public. It is not required that the imitation shall be so close as to require a careful examination to detect the difference, nor that it shall be such that persons entirely familiar with one would not be mistaken. But it must have such a resemblance to the genuine that the general public would be likely to mistake the one for the other."

"A mere design to injure would not of itself be sufficient. It must be accompanied by evidence of actual or prospective injury, but in establishing the injury the intent may properly be considered."

Per N. Y. Ct. of App. "The question in this, as in every other case, is whether there is such resemblance between the two as to deceive a purchaser using ordinary caution. . . . . The court is not bound to interfere where ordinary attention will enable purchasers to discriminate between the trade-marks used by different parties."

426. Dawes *v.* Davies.

1873. *N. Y. C. P.* — *Codd. Dig.* 260.

THE plaintiff being an umbrella manufacturer, whose trade-mark consisted of the number "140," placed in a white oblong within a five-pointed star, the defendants used on their umbrellas the number "142" within a sunburst.

Motion by the plaintiffs for an injunction to restrain the defendants from so doing refused, on the ground that it was not probable that persons of ordinary intelligence would be deceived.

427. Hardy *v.* Cutter.

1873. *Dt. Ct. of Cal.: Wheeler, J.* — 3 *U. S. Pat. Gaz.* 468.

THE plaintiffs being manufacturers of "*Cutter*" whiskey (as successors by purchase to J. H. Cutter), who branded their barrels with a crown and the words "*J. H. Cutter — Old Bourbon*," and used wrappers and labels containing the same words with other particulars, the defendant, a son of J. H. Cutter, also manufactured whiskey, and used wrappers and labels containing the words "*J. F. Cutter, son of the late J.*

H. Cutter, of Louisville, Ky.," the wrappers and labels bearing no other resemblance to the plaintiffs'.

Action for an injunction to restrain the defendant from so doing.

Demurrer allowed, on the ground that there was no similarity between the marks except in the use of the name "*Cutter*," and that, with regard to the name, the defendant was entitled to use his own name in an honest manner.

"Every person has the right to use his own name in connection with the articles he manufactures or sells, provided he does not use it in such a way as to deceive or defraud the public, or to obtain for himself, at the expense of another, an undue advantage."

428. Lowell Manufacturing Co. *v.* Larned.

1873. *U. S. C. C. Dt. of Penn.* — *Codd. Dig.* 341.

THE plaintiffs being carpet manufacturers, who were in the habit of rolling their carpets upon a peculiarly formed stick, made in two pieces, and with the ends shaped into octagonal rings, which appeared in the centre of the rolls of carpet, and who had registered this stick in the U. S. as their trade-mark, the defendants began to roll their carpets upon similar sticks.

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.[1]

429. Clemens *v.* Such.

July 11, 1873. *N. Y. Sup. Ct.* — *Codd. Dig.* 312.

THE plaintiff, an author, who wrote under the *nom de plume* of "*Mark Twain*," having agreed to allow the defendant to publish one of his essays in a book of selections, and having delivered to him a volume of his essays, published but not copyrighted, for him to select one of them therefrom, the de-

[1] While it is not improbable that the stick used by the complainant in this case was a perfectly good trade-mark, the injunction was granted upon an *ex parte* application, practically with the defendants' consent.

fendant published in his book six essays purporting to be by Mark Twain, with a statement on the title-page that they had been specially revised and selected by Mark Twain for the purpose, five of the six being taken from the plaintiff's volume, and the sixth not being his at all.

On motion by the plaintiff injunction granted to restrain the defendant from using the *nom de plume* on the title-page of his book, or as the author or reviser of any book, and from publishing any matter alleged to have been written by the plaintiff under his *nom de plume*, except one essay from the plaintiff's volume, but the defendant to be at liberty to state on his title-page that the book included a sketch by Mark Twain.[1]

430. Osgood *v.* Rockwood.

September, 1873. *U. S. C. Ct. S. Dt. of N. Y.: Blatchford, J.*— 11 *Bl. C. C.* 310.

THE plaintiffs being American patentees, under an assignment by the English inventor, of a class of prints known as "*Heliotypes*," and who had registered the word "*Heliotype*" as their trade-mark in respect thereof under the U. S. Act of 1870, the defendant used the word "*Heliotype*" or "*Heilotype*" on prints not produced by the patented process.

Injunction to restrain the defendant from using the word refused, on the ground that, whatever rights the plaintiffs might have apart from the act, and which the act preserved to them (but which the bill was not framed to assert), they were not entitled to any remedy in virtue of the registration under the act, since the defendant had not used the word upon substantially the same goods as those in respect of which it was registered by them.[2]

[1] See *Lord Byron* v. *Johnston*, 23.

[2] It is not to be doubted that had the complainants here relied upon their common law right they would have prevailed; and it is equally plain that had their mark been more carefully registered, an injunction might have issued.

431. Raggett *v.* Findlater.

November 11, 1873. *Malins, V. C.* — *L. R.* 17 *Eq.* 29; 43 *L. J. Ch.* 64; 29 *L. T. N. S.* 448; 22 *W. R.* 53.

THE plaintiff being a manufacturer of stout, who sold it in bottles bearing labels on which the words "*Nourishing London Stout*" were conspicuous, the defendants sold stout in bottles bearing labels having on them the words "*Nourishing Stout*," but differing in other respects from the plaintiff's.

Injunction to restrain the defendants from using the words "*Nourishing Stout*" refused, on the ground that a right of trade-mark could not be acquired in a mere English adjective denoting quality.

"It is of the highest importance that, on the one hand, every protection should be given to trade-marks when fairly and properly used, and when used within just limits; and, on the other hand, it is of great imporatnce that, by the use of a particular word or anything which may be called a trade-mark, the right should not be unduly extended so as to infringe on the right of traders to call their articles by a quality they possess, or to give an undue protection to any man who happens to use a particular word."

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432. Siegert *v.* Ehlers.

February 3, 1874. *Trinidad Sup. Ct.* — *Cited* 7 *Ch. D.* 803; 38 *L. T. N. S.* 351.

THE plaintiffs being a firm manufacturing at Ciudad Bolivar (formerly Angostura), in Venezuela, a fluid which they called "*Aromatic Bitters*," and put up in bottles enclosed in wrappers, which were printed with the name of the preparation, and a description in several languages of its virtues and uses, the defendant, an agent of another manufacturer at Ciudad Bolivar, sold another article in bottles in very similar wrappers.

On motion by the plaintiffs injunction granted to restrain the defendant from using wrappers printed with the name

"*Aromatic Bitters*," and a description of the uses of the article, in imitation of the plaintiffs'. [1]

433. Cope *v.* Evans.

February 14, 1874. *Hall, V. C.* — *L. R.* 18 *Eq.* 138; 30 *L. T. N. S.* 292; 22 *W. R.* 453.

THE plaintiffs being cigar manufacturers, who sold their cigars in boxes branded with the words "*Flor Fina Prairie Superior Tabac*," and the figure of a hunter, the defendants manufactured cigars and sold them in boxes branded with the words "*Flor de la Prairie*," and the half-figure of a girl.

Injunction to restrain the defendants from using the word "*Prairie*" refused, on the ground that no actual deception was proved, and that it was not to be anticipated that deception would occur.

"In cases where it appears that defendants have adopted a plaintiff's trade-mark, and it is proved that defendants' object in doing so was to pass off their own goods as those of the plaintiff, the court will, without further inquiry, restrain the defendants, and it will also do so where there has been such adoption, although proof of the defendants' object be wanting, if it appears that any one has in fact been thereby induced to buy the defendants' goods as being the goods of the plaintiff. In the absence of proof of such object and of such deception, if the two trade-marks are not to the eye of the court either altogether identical, or so similar that the court considers the difference unsubstantial, the plaintiff must make out to the satisfaction of the court that its intervention is required to protect the plaintiff from the defendants' goods being taken for his (the plaintiff's). For the plaintiff to say that his name or mark is to be found on the defendants' goods is not sufficient." [2]

[1] See *Coffeen* v. *Brunton*, **99**.

[2] It is to be remarked that the court declined to issue an injunction, because the marks as applied presented a wholly different appearance, and there was not sufficient evidence on which to predicate the conclusion that the public would be misled. The learned judge said in effect: There is no evidence of intent or of deception or mistake, and, in view of the obvious differences in the labels and appearance of the goods and want of proof of fraud, I cannot assume the responsibility of saying that the case is one for an injunction.

434. Wolfe *v.* Burke.

March, 1874. *N. Y. Sup. Ct.* — 7 *N. Y. Sup. Ct.* (7 *Lans.*) 151; 2 *U. S. Pat. Gaz.* 441. *N. Y. Ct. of App.* — 56 *N. Y.* (11 *Sickels*) 115.

THE defendants manufactured and sold spirits, in succession to Udolpho Wolfe, as "*Wolfe's Aromatic Schiedam Schnapps*," and threatened proceedings against the plaintiffs, who sold "*Hudson G. Wolfe's Bell Schnapps.*"

Injunction, which had been granted to restrain the defendants from interfering with the plaintiffs' business by such threats, dissolved; and

Held, that the plaintiffs were not entitled to the favorable consideration of a court of equity, because: (1.) they had endeavored to secure a part of the good-will of the defendants' business, while avoiding an infringement of their trade-mark; (2.) they, as well as the defendants, had improperly represented their article as, not merely a spirit, but a medicinal preparation.[1]

435. Brown *v.* Mercer.

March, 1874. *N. Y. Super. Ct.: Van Vorst, J.* — 37 *N. Y. Super. Ct.* (5 *J. & S.*) 265.

THE plaintiff being a manufacturer of a preparation for dressing leather, who sold his preparation in bottles enclosed in wrappers peculiarly colored and arranged, the defendant sold a similar preparation in similar bottles, and gradually assimilated his wrappers more and more to the plaintiff's.

On motion by the plaintiff injunction granted to restrain the defendant from infringing the plaintiff's rights.

"It is no answer that, in certain particulars, the defendant's label differs from the plaintiff's, so long as the imitation in other respects is so apparent that purchasers have been and are likely to be deceived." [2]

[1] See *Pidding* v. *How*, 60.

[2] See *Williams* v. *Johnson*, 150.

436. Missouri (State of) *v.* Gibbs.

March, 1874. *Missouri Sup. Ct.* — 56 *Mo.* (15 *Post*) 133.

THE defendant imitated Messrs. Lea & Perrin's "*Worcestershire Sauce*" and the labels and wrappers used upon it by them.

Held, that the Missouri Statute of Feb. 22, 1870, making an infringement of trade-mark a criminal offence in that State, was applicable to cases in which the imitated trade-mark was the property of English or other foreign manufacturers.

"Trade-marks are valuable to the persons who have a proprietary interest in them, and to the people who buy and use the articles, because they are a guarantee of their genuineness."

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437. Kidd & Co. *v.* Mills, Johnson & Co.

March 28, 1874. *U. S. Patent Office: Leggett, Comm.* — 5 *U. S. Pat. Gaz.* 337.

S. N. PIKE having, when in partnership at Cincinnati with H. Pike as "*S. N. and H. Pike*," adopted as trade-marks for whiskey the words "*Magnolia*" and "*Dave Jones*," continued to use those marks, sometimes trading alone, sometimes in partnership with various other persons. At a time when he was in partnership with Kidd as "*S. N. Pike & Co.*" he sold the premises on which, and the apparatus, etc., with which the company carried on business at Cincinnati, but which were his private property, to Mills, Johnson & Co., and gave them what purported to be a license to use the brands used by him. Mills, Johnson & Co. having registered those words as their trade-marks, Kidd & Co., consisting of Kidd and another surviving partner in the firm of "*S. N. Pike & Co.*," carrying on business at New York, since the removal from Cincinnati, applied for the registration of those words as their trade-marks.

Interference declared between the parties to try the right to the marks.

Held, (1.) that on the dissolution of the various firms in which S. N. Pike was concerned, the right to use the trade-marks must be held to have continued in him as the continuing partner, and to have been abandoned by the retiring partners, they having set up no claim thereto; (2.) that he brought this right with him into the successive firms which he formed; (3.) that at the time of the sale to Mills, Johnson & Co. the trade-marks were the property of S. N. Pike & Co., and not of S. N. Pike individually; (4.) that the right to use the trade-marks did not, therefore, pass to Mills, Johnson & Co. on the sale of S. N. Pike's Cincinnati premises, nor under the license which he purported to give them; (5.) that the trade-marks, therefore, remained the property of S. N. Pike & Co., and passed to Kidd & Co., the successors of that firm, and that Kidd & Co. were, therefore, entitled to registration.

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438. Reid *v.* Sibbald.

April 10, May 13, 1874. *Home, Sheriff Subs.; Monro, Sheriff of Linlithgowshire.* — 18 *Journ. of Jurisp.* 392.

THE plaintiff being a sheriff's officer named William Roberts, the defendant, a draper, began to issue circulars to his debtors, signed "*Andrew Roberts*," threatening proceedings if their debts were not paid within a certain time.

Interdict granted, notwithstanding that the defendant had discontinued the practice, and had given up the remaining circulars, to restrain the defendant from attaching the name "*Andrew Roberts*," or "*Roberts*" with any other Christian name, to such circulars, on the ground that the defendant intended to induce and had induced a belief that the circulars were issued by the plaintiff, and that the plaintiff would be injured by his name being supposed to be affixed to such absurd documents.

439. The Glendon Iron Co. *v.* Uhler.

May, 1874. *Penn. Sup. Ct.* — 75 *Penn. St.* 467; 15 *Amer. Rep.* 599; 13 *Am. L. Reg. N. S.* 543; 6 *U. S. Pat. Gaz.* 154.

THE plaintiffs having long stamped the word "*Glendon*" on their iron manufactured within that borough, having commenced to do so prior to the incorporation of the borough, the defendants set up in business in the same place, and began to stamp the same word on their iron.

Injunction to restrain the defendants from so doing refused, on the ground that all persons manufacturing within the borough had an equal right to use the name.[1]

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440. Isaacs *v.* Daly.

May, 1874. *N. Y. Super. Ct.: Curtis, J.* — 39 *N. Y. Super. Ct.* (7 *J. & S.*) 511.

THE plaintiff being the author of a copyright play entitled "*Charity*," the defendant purchased another play bearing the same name, and proceeded to represent it under that name.

Motion by the plaintiff for an injunction to restrain the defendant from so doing refused, on the ground that the use of a word of such general application could not be restrained in the absence of bad faith, and that the defendant did not appear to have acted otherwise than *bonâ fide*.

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441. Richards *v.* Williamson.

June 10, 1874. *Bacon, V. C.* — 30 *L. T. N. S.* 746; 22 *W. R.* 765.

THE plaintiff being a gun-maker, who stamped the lock-plates and levers of his rifles with the name "*Westley Richards*," or "*Westley Richards & Co.*," the defendants bought up some of such lock-plates and levers belonging to con-

[1] This case is distinctive in that the name had become a trade-mark *before* it had acquired a geographical significa-tion.

demned or worn-out guns, and made them up with parts of other guns not of the plaintiff's make into complete carbines.

Injunction granted to restrain the defendants from so using such lock-plates and levers.

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442. Rodgers *v.* Rodgers.

July 28, 1874. *James and Mellish, L. JJ.* — 31 *L. T. N. S.* 285.

THE plaintiffs being J. Rodgers & Sons, who had long carried on business as cutlers in Norfolk Street, Sheffield, and stamped their goods, among other marks, with their name and address, the defendants, R. Rodgers & Son, also carried on business as cutlers in Sheffield, and they and their predecessor in business had since 1861 described their place of business and marked their cutlery as from "*Norfolk Works, Sheffield.*"

Action for an injunction to restrain the defendants from using the words "*Norfolk Works*," or "*Norfolk.*"

Held, that the injunction must be refused, on the ground of the plaintiffs' delay, and failure to produce evidence of actual deception, but that no costs of the cause prior to the appeal could be given, on account of the defendants' unfair dealing.

Per Mellish, L. J. "I do not think that, as a matter of law, the mere fact that it (the title) has been used for a great number of years necessarily affords a defence. If it was clearly made out that it was originally used for the purpose of fraud, that it was continued for the purpose of fraud, and that it has the practical effect of deceiving the public, I do not think that the lapse of years would prevent the plaintiffs from having a remedy." "In my judgment, in order to make out a clear case when it has lasted for such a great number of years as this, the plaintiffs ought to prove satisfactorily that persons have actually been deceived." [1]

[1] An explanation of this decision is afforded by the language of Lord Justice Mellish above quoted.

443. The Glen and Hall Manufacturing Co. *v.* Hall.

September, 1874. *N. Y. Sup. Ct.* — 6 *N. Y. Sup. Ct.* (6 *Lans.*) 158. *N. Y. Comm. of App.* — 61 *N. Y.* (16 *Sickels*) 226; 19 *Amer. Rep.* 278.

THE defendant being the successor in business of Joseph Hall, who had long carried on business at No. 10 South Water Street, Rochester, New York, began in February, 1869, to use in his hand-bills the words "*The Old Joseph Hall Agricultural Works, No. 10 South Water St., Rochester, N. Y.*" In September or October, 1869, the plaintiffs opened their establishment in the same street, and styled themselves in their hand-bills, etc., "*The Glen and Hall Manufacturing Company, No. 10 South Water St., Rochester, New York.*"

Action for an injunction and counter-claim. Injunction granted on the defendant's counter-claim to restrain the plaintiffs from using the words and figures "No. 10." [1]

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444. Consolidated Fruit Jar Co. *v.* Dorflinger.

October, 1874. *U. S. C. C. E. Dt. of Penn.: Cadwallader, J.* — 2 *Am. L. T. N. S.* 511.

THE plaintiffs being manufacturers of jars, on which they placed certain trade-marks, consisting respectively of the words "*Mason's Patent, November 30th, 1858,*" "*Mason's Improved,*" "The Mason Jar of 1858," as to which jars the patent under which they were made had been decided to be invalid, and also another trade-mark, consisting of the words "*The Mason Jar of 1872,*" not open to the same objection, the defendants sold other jars similarly marked.

On motion by the plaintiffs for an injunction to restrain the defendants from infringing their trade-marks:

Held, that, as to the first three marks, the plaintiffs were disentitled by reason of the reference to the invalid patent as if it were valid; but that, as to the last mark, a renewed application might be made.

"No title can be successfully asserted in a trade-mark which is of

[1] See *Gillott* v. *Esterbrook*, 269.

a tendency to mislead or deceive the public. This objection may avail a defendant, notwithstanding what would otherwise be imputable to him as misconduct. The doctrine is that the complainant must come into a court of equity with clean hands." [1]

445. Morse *v.* Worrell.
(Afterwards Morse *v.* Cornwell.)

1874; 1875. *Phila. C. P.* — 9 *Am. L. Rev.* 368; *Codd. Dig.* 242.

THE plaintiff being a manufacturer of stove polish, on which he used a trade-mark consisting of the device of an orb, with rays of light, rising over a piece of water, with the words "*Rising Sun Stove Polish*," the defendant sold other stove polish with a very similar device, with the words "*Rising Moon Stove Polish.*"

Injunction granted to restrain the defendant from using the device, also from using the name "*Rising Moon*," and from using the device of an orb rising over a piece of water.

446. In re Godillot.

November 16, 1874. *U. S. Patent Office: Spear, Act. Comm.* — 6 *U. S. Pat. Gaz.* 641.

APPLICATION for the registration of a label, under the Act of Congress of 1874, refused, on the ground that, inasmuch as it possessed all the characteristics of a trade-mark, it could only be registered as such.

447. Cotton *v.* Gillard.

November 24, 1874. *Jessel, M. R.* — 44 *L. J. Ch.* 90.

THE defendant having invented a sauce which he called the "*Licensed Victuallers' Relish*," and placed in bottles labelled with a view of the Licensed Victuallers' Asylum, the sauce was sold at first by the defendant and his partners in business, and after the dissolution of partnership (on which event the

[1] See *Pidding* v. *How*, 60.

recipes and formulas used by the defendant reverted to him) by the defendant's son, who also bought the interest of the defendant's former partners in the sauce. The son becoming bankrupt, his interest in the sauce was bought by the plaintiffs from his trustee in bankruptcy, but the defendant retained the secret recipe, and publicly announced his claim to the title and trade-mark.

Suit for an injunction to restrain the defendant from using the name and trade-mark. Injunction refused, on the ground that a trade-mark could not exist or be transferred in gross, and that the plaintiffs were not entitled to apply to an article of their own invention the name and mark appropriated to an article of the recipe, of which they were ignorant, the result of such a course of proceeding being to pass off a spurious article on the public as the genuine one of the defendant's invention.[1]

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448. Taylor *v.* Gillies.

December, 1874. *N. Y. C. P.* — 5 *Daly*, 285. *N. Y. Ct. of App.* — 59 *N. Y.* (14 *Sickels*) 331; 17 *Amer. Rep.* 333.

THE plaintiff being a manufacturer of saleratus, which he sold in packages labelled "*Allen's Gold Medal Saleratus*," and "*Taylor's Gold Medal Saleratus*," the defendants began to sell the same article in packages labelled "*Gillies' Gold Medal Saleratus.*"

Injunction to restrain the defendants from using the words "*Gold Medal*," in connection with their saleratus, refused, on the ground that no exclusive right could be claimed in those words, the words being necessarily descriptive in their nature.[2]

[1] See *Pidding* v. *How*, 60.

[2] See *Batty* v. *Hill*, 218.

449. Estcourt *v.* The Estcourt Hop Essence Co.

December 3, 1874; January 21, 1875. *Malins, V. C.* — 31 *L. T. N. S.* 567. *Lord Cairns, C.; James and Mellish, L. JJ.* — *L. R.* 10 *Ch.* 276; 44 *L. J. Ch.* 223; 32 *L. T. N. S.* 80; 23 *W. R.* 313.

THE plaintiffs being manufacturers of a substitute for hops in brewing, which they called "*Estcourt's Hop Supplement*," the defendant company began to sell another article as "*Estcourt and Co.'s Hop Essence.*"

Suit by the plaintiffs for an injunction to restrain the defendants from using the name "*Estcourt*," and from using the secret of the "*Hop Supplement*," which they alleged to have been communicated to the defendants by the defendant C. Estcourt, who had been in connection with the plaintiffs.

Held, on appeal: (1.) that the defendant, C. Estcourt, was under no obligation to keep the plaintiffs' secret, and, further, that it was not proved that the defendant company had obtained their knowledge from him; (2.) that the plaintiffs were disentitled to obtain an injunction by having delayed to take proceedings for seven months after they became aware of the assumption of the name "*Estcourt*" by the defendant company, and failing even after that period to produce evidence of actual deception; (3.) that both parties being engaged in an improper speculation, and the defendant company having made statements in their advertisements calculated to lead to the belief that they were the original inventors of the article, the bill must be dismissed without costs.[1]

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450. Ward *v.* Beeton.

December 21, 1874. *Malins, V. C.* — *L. R.* 19 *Eq.* 207; 23 *W. R.* 533.

THE defendant's copyrights, stock in trade, etc., as a publisher (including a publication called "*Beeton's Christmas Annual*"), having been purchased by the plaintiffs in 1866, in 1869 the defendant entered into an agreement with the plaintiffs, under which he was to enter into the plaintiffs' service

[1] See *McLean* v. *Fleming*, **580**; *Pidding* v. *How*, **60**.

at a salary, and to give all his time to their business, and was not to permit the use of his name in publications without the consent of the plaintiffs, who were to have the right to use it. The plaintiffs and defendant having disagreed, the plaintiffs caused the Annual for 1874 to be prepared without the defendant's assistance, upon which the defendant put forth advertisements denying that such Annual was in continuation of his series, and stating that the genuine Annual was one which was being prepared by persons other than the plaintiffs.

Motion by the defendant to dissolve an injunction which had been granted to restrain the publication of such advertisements refused, on the ground that the plaintiffs had a right to use the title, notwithstanding that the defendant had not prepared the work, and that the defendant's conduct was contrary to his engagement.

P. 216. "When you sell a newspaper, it is not merely the right to sell one number of it, but continuing to publish it from day to day, it may be as long as the world lasts, under the name by which it has become known." [1]

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451. Broughton *v.* Broughton.

May 25, 1875. *Jessel, M. R.* — 44 *L. J. Ch.* 526; 23 *W. R.* 779.

G. BROUGHTON and the defendant having carried on business in partnership, at the death of the former the partnership was insolvent, but the defendant, being also G. Broughton's executor, carried on the business alone with such success that he subsequently sold it for £1,700.

Suit for the administration of G. Broughton's estate.

Held, that the defendant was only chargeable with the value of a moiety of the business at the time of the testator's death, and not at the time of the sale of the business.

[1] See *Hogg* v. *Kirby*, 10.

452. Bulloch, Lade & Co. *v.* Gray.

January 6, 1875. *Guthrie, Sheriff Subs. ; Dickson, Sheriff of Lanarkshire.*— 19 *Journ. of Jurisp.* 218.

CROSS suits by two rival firms of distillers at Glasgow, of whom the one firm called their establishment "*The Loch Katrine Distillery*," and the other called their whiskey "*Loch Katrine Whiskey*," for interdicts to restrain the respective defendants from using the words "*Loch Katrine.*"

Interdict in both cases refused, on the ground that in each case the word was used as descriptive of the water used in the distillery, and that any one who used Loch Katrine water in the manufacture of his whiskey was at liberty to state that such was the fact.[1]

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453. Prudential Assurance Co. *v.* Knott.

January 20, 1875. *Lord Cairns, C.; James and Mellish, L. JJ.* — *L. R.* 10 *Ch.* 142; 44 *L. J. Ch.* 192; 31 *L. T. N. S.* 866; 23 *W. R.* 249.

SUIT for an injunction to restrain the publication of a pamphlet alleged to contain passages injurious to the plaintiff company's reputation and business.

Held, that the Court of Chancery had no jurisdiction to restrain the publication of a libel, even when injurious to property.

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454. Harter *v.* Souvazoglu.

January 20, 1875. *Hall, V. C.* — *W. N.* 1875, *p.* 11; *L. J. Notes of Cas.* 1875, *p.* 20. *James and Mellish, L. JJ.* — *W. N.* 1875, *p.* 101.

THE plaintiffs being exporters of cotton cloths to Turkey and the Levant, who affixed to their cloths a certain heading consisting of different colored threads in combination, the defendants shipped similar goods to Constantinople with a similar heading.

[1] This decision would seem to proceed upon the assumption that Scotch whiskey is not always the pure juice of the grain.

Injunction granted to restrain the defendants from infringing the plaintiffs' trade-mark.[1]

455. Weston *v.* Ketcham. (1.)

February 1, 1875. *N. Y. Super. Ct.* — 39 *N. Y. Super. Ct.* (7 *J. & S.*) 54.

THE inventor of "*Captain S. Pepper's Extra Signal Oil*" (the secret of which preparation was only known to himself, his wife, and the plaintiff Weston) arranged with the defendant Ketcham for the sale by the latter of his oil, on terms of equal profits; and, after Pepper's death, Weston and Ketcham entered into a similar arrangement as "*F. O. Ketcham & Co.*," one tenth of the profits being paid to Pepper's widow in return for her interest in the trade-mark. Weston subsequently arranged with the widow for the cancellation of the previous agreement with her, and the substitution of an exclusive agreement with himself, for an annual sum, contrary to the wishes of his then partners, Ketcham and another, who had instructed him to negotiate on behalf of the partnership; but the partnership continued to deal in the article under the same name, the annual payments being made out of the partnership funds, until the dissolution of the partnership two years later. After such dissolution the plaintiffs, being Weston and the third partner in the old firm, continued to manufacture the same article under the same name and trade-mark, as "*Weston & Fisk*," and the defendants, Ketcham and another, who were not acquainted with the secret, also manufactured an article under the same name and trade-mark, as "*F. O. Ketcham & Co.*"

Injunction, which had been granted to restrain the use of the name and trade-mark by the defendants, dissolved, on the ground, that, (1.) under the circumstances of the case, Weston's partners in the original firm of "F. O. Ketcham & Co." were entitled to treat him as a trustee for them of the rights which he had acquired under the new arrangement with Pepper's widow; (2.) that they were not debarred from enforc-

[1] See *Williams* v. *Johnson*, 150.

ing their right by acquiescence, since they were at a disadvantage, in that Weston alone knew the secret, and were, therefore, compelled to submit; (3.) that on the dissolution of Ketcham & Co. all the partners retained equal rights in the trade-marks, etc., of the firm; (4.) and that the fact that the defendants were not acquainted with the secret gave no rights against them to the plaintiffs, whose right in the trade-mark was only equal to theirs; whatever remedy might be open to any member of the public who was deceived by them.

456. In re Rothschild.

February 13, 1875. *U. S. Patent Office: Spear, Act. Comm.* — 7 *U. S. Pat. Gaz.* 220.

On an application for registration of a trade-mark:

Held, that under the U. S. Statute of 1870, a new trade-mark, which had been devised and originated by the applicant, might be registered, although it had not been actually used by him previous to his application for registration.

457. Fisher & Co. (Limited) *v.* The Apollinaris Co. (Limited).

February 25, March 23, 1875. *Malins, V. C.* — *L. R.* 10 *Ch.* 299 *n.*; 32 *L. T. N. S.* 628. *James and Mellish, L. JJ.* — *L. R.* 10 *Ch.* 297; 44 *L. J. Ch.* 500; 32 *L. T. N. S.* 628; 23 *W. R.* 460.

Suit by Fisher & Co. (limited), and E. Fisher, whose business had been bought by the company, for an injunction to restrain the defendants from continuing to publish a letter of apology which had been given them by E. Fisher, in order to induce them to discontinue prosecuting him under the Merchandise Marks Act, 1862, for selling spurious aerated water in the Apollinaris Co.'s bottles, such continued publication being injurious to the plaintiff company.

Held, on demurrer, by the L. JJ., that there was nothing improper in compromising a prosecution under the act in

question, and that the defendants could not be restrained from continuing to publish the letter.

458. Smith *v.* Mason.

March 4, 1875. *Hall, V. C.* — *W. N.* 1875, *p.* 62 ; *L. J. Notes of Cas.* 1875, *p.* 44.

THE plaintiff being a chemist and druggist, who sold a medicine of his invention under the name of "*Pectorine*," the defendant began to sell another preparation under the same name.

On motion by the plaintiff injunction granted to restrain the defendant from so doing.

459. Wilson *v.* Maxfield.

March 15, 1875. *Malins, V. C.* — *L. J. Notes of Cas.* 1875, *p.* 51.

THE plaintiff being a sewing-machine manufacturer, who had stamped a figure of St. George and the Dragon upon certain sewing-machines made by him, and known as "*England's Queen*," but who had not used the device on bill-heads or circulars, or generally in his business, before bill filed, the defendant, who had formerly been in the plaintiff's employ, placed on machines of his own make, and on his circulars, a device of St. George and the Dragon, with the words "*Maxfield & Co.'s trade-mark.*"

Injunction to restrain the defendant from using the device refused, on the ground that the plaintiff had acquired no reputation for the mark by use, and that there was no attempt by the defendant to deceive or probability of deception.[1]

[1] Under the English cases, there must be something more than a mere adoption and application of a trade-mark to create an exclusive right at common law. The American cases, however, would seem to be to the effect that as soon as the mark is applied it becomes the property of him who is the first to formally make the application. Browne on Trade-Marks, § 52.

460. Gouraud *v.* Trust.

March, 1875. *N. Y. Sup. Ct.* — 10 *N. Y. Sup. Ct.* (3 *Hun*) 627.

THE plaintiff, whose name had formerly been "Dr. J. W. Trust," but had been changed to "Dr. T. F. Gouraud," being the manufacturer of a cosmetic which he called "*Gouraud's Oriental Cream or Magical Beautifier*," the defendants, his sons, who had retained their original name, began to sell a cosmetic under the name of "*Creme Orientale, by Dr. T. F. Gouraud's Sons.*"

Injunction granted to restrain the defendants from so infringing the plaintiff's rights, on the ground that the statement of the defendants' relationship to the plaintiff, though true, was made with the intention of deceiving, and was calculated to deceive.[1]

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461. Godillot *v.* Hazard.

April, 1875. *N. Y. Super. Ct.: Monell, C. J.* — 49 *How. Pr.* 5.

THE plaintiff being an importer of an article made expressly for him by a particular firm in Paris, consisting of compressed ingredients for Julienne soup, and which he sold under a label containing the words "*Conserves Alimentaires*," the arms of the city of Paris, with a monogram "*A. C.*" on each side, and the words "*Paris*" and "*Julienne*," with directions for use, beneath; the defendants began to sell a similar article under a similar label, except that the monogram was changed to "*F. G.;*" and they admitted that their label had, by their orders, been copied from the plaintiff's.

Suit for an injunction to restrain the defendants from infringing the plaintiff's rights.

Held, (1.) that the plaintiff had no exclusive right in the word "*Julienne, per se*, that word being descriptive of an article commonly made; (2.) but that the plaintiff was entitled to an injunction to restrain the use of his compound label by the defendants; (3.) and that the fact that the plaintiff did

[1] See *Lee* v. *Haley*, 325.

not himself manufacture the article constituted no defence, since the article was expressly made for and imported by him.

"The property and right to protection is in the device or symbol which is invented and adopted to designate the goods to be sold, and not in the article which is manufactured and sold."[1]

462. Llewellyn *v.* Rutherford.

May 5, 1875. *Common Pleas.* — *L. R.* 10 *C. P.* 456; 44 *L. J. C. P.* 281; 32 *L. T. N. S.* 610.

Held, that the sum which an outgoing tenant of a public-house was entitled, under agreement, to receive on the termination of his lease, as the value of the good-will, must be determined by a calculation of the sum which an incoming tenant would be willing to pay for the good-will in such a case, and that a general rise in the value of property in the neighborhood should be taken into consideration.

Per Brett, J. "In some classes of business, when the trade has long been carried on in a profitable manner in a particular house, and a new tenant comes in and continues to carry on the same business there, it is found by experience that many, if not all, of the customers resort there as before. This is found so regularly to happen that it has become usual to pay a money value for it, which is commonly called 'good-will.' It may be that there may be a species of good-will which may be the subject of bargain and sale, although not dependent on the business being carried on in any particular place: for instance, in the case of what are called 'quack medicines.' But when we come to speak of the good-will of a public-house, it is obvious that it is a thing which is attached to a locality."

[1] The decision in this case was affirmed upon appeal by the unanimous opinion of the court of last resort of New York. There can be no doubt that a mark used to denote that the goods on which it is used are the *selection of a merchant* will be protected.

463. Devlin *v.* Devlin.

May, 1875; April 3, 1877. *N. Y. Sup. Ct.* — 11 *N. Y. Sup. Ct.* (4 *Hun*) 651. *N. Y. Ct. of App.* — 69 *N. Y.* (24 *Sickels*) 212; 15 *Alb. L. J.* 290.

THE plaintiffs being engaged in the clothing business as "*Devlin & Co.*," the defendant, J. S. Devlin, who carried on the same business alone, put out a wire sign in front of his shop, bearing the words "*Devlin & Co.*," with the letters "*J. S.*" in a monogram above, the number of the shop, "*826*," on each side, and the word "*clothing*" below.

An injunction having been granted to restrain the defendant from using the name "*Devlin & Co.*," and from continuing to use such sign, and from trading in any other name than his own christian names and surname, in plain characters and without monograms, the defendant, upon service of the order, so varied his sign that it now contained the initials "*J. S.*," with "*826*" on each side in the top line, "*Devlin's*" with a hand in the middle, and "*clothing*" in the bottom line.

On motion by the plaintiffs to commit the defendant for breach of the injunction: *Held*, by the Supreme Court, that the defendant had not sufficiently obeyed the injunction, and was, therefore, guilty of contempt, and that a fine must be imposed and the sign removed.

Held, by the Court of Appeals, that the decision of the Supreme Court on a point of fact must be followed, but that the case was sufficiently open to doubt for no costs of the appeal to be given to either party.[1]

464. In re Hankinson.

June 2, 1875. *U. S. Patent Office: Thacher, Comm.* — 8 *U. S. Pat. Gaz.* 89.

APPLICATION by a carpet-cleaner, who used a certain mark on his wagons, circulars, etc., and on tags attached to the carpets, for the registration of such mark as his trade-mark, refused, on the ground that the marks of manufacturers or

[1] See *Burgess* v. *Burgess*, 117.

merchants were alone registrable within the U. S. Statute of 1870, and that the applicant was incapable of specifying, in accordance with that statute, the class and description of goods or merchandise to which the mark was appropriated.

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465. The Apollinaris Company (Limited) *v.* Norrish.

June 3, 1875. *Bacon, V. C.* — 33 *L. T. N. S.* 242.

THE plaintiffs being, by agreement with the owners of the Apollinaris Spring in Germany, the exclusive importers of "*Apollinaris Water*" into England, the defendants sold an artificial water, containing the same chemical constituents as the natural water, as "*London Apollinaris Water*," but in different bottles, differently labelled, from those of the plaintiffs.

On motion by the plaintiffs injunction granted to restrain the defendants from using the name "*London Apollinaris Water*," or making any other use of the name "*Apollinaris*" calculated to deceive.[1]

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466. Blackwell *v.* Wright.

June, 1875. *No. Carolina Sup. Ct.* — 73 *N. Car.* 310.

THE plaintiff being a manufacturer of tobacco at Durham, North Carolina, whose trade-mark consisted of the figure of a bull, with the words "*Genuine Durham Smoking Tobacco, Manufactured only by W. T. Blackwell (successor to J. R. Green & Co., Durham, N. C.*," the defendant used a trade-mark consisting of the figure of a bull's head, arranged to occupy the central part of a circular design, and the words "*The Original Durham Smoking Tobacco, Manufactured by W. A. Wright*," and published various denials of the exclusive right of the plaintiff to sell "*Genuine Durham Smoking Tobacco.*"

Action for damages, and for an injunction to restrain the

[1] See *Congress, etc. Spring Co.* v. *High Rock Congress Spring Co.* **354**; *Apollinaris Co.* v. *Moore.*

defendant from infringing the plaintiff's trade-mark, and slandering his title.

Demurrer allowed, and injunction refused, on the ground that there was no such similarity between the marks as to be calculated to produce deception.

Per Bynum, J. "This rule (*i. e.* that of the protection of trade-marks) is grounded upon a twofold reason: 1st, that the public may be protected from being imposed upon by a spurious or inferior article, as an imitation or counterfeit almost always is; and, 2d, that the inventor may have the exclusive benefit of the reputation which his skill has given to the article made by him."

"It will make no difference whether the party designed to mislead the public, or whether the symbol adopted was calculated to deceive. But if it appear that the trade-mark alleged to be imitated, though resembling the complainant's in some respects, would not probably deceive the ordinary mass of purchasers, an injunction will not be granted. An imitation is colorable, and will be enjoined, which requires a careful inspection to distinguish its mark and appearance from that of the manufacture imitated."

"We must assume that dealers and consumers of such a commodity have ordinary intelligence, and adopt ordinary precaution against imposition and fraud."[1]

[1] See *Blackwell* v. *Armistead*, 392. In that case, which was decided by a federal court Judge Rives very ably formulates the doctrine of infringement as follows: —

"The doctrine on this subject has grown with commerce; so much of it as is necessary or material for our present inquiry is comprehended in a single proposition. It is the *seminal* principle of the whole doctrine. The simple statement of it is, that the dealer has *property* in his trade-mark. This is allowed him because of the right which every man has to the rewards of his industry and the fruits of his discovery, and because of the wrong of permitting one man to use as his own that which belongs to another. In regard to the latter, it may be well said that any imitation of a trade-mark, calculated to deceive the unwary customer, differs from an absolute forgery, not in the *nature*, but rather in the *extent of the injury*. The dissimilarity to the expert wholesale dealer may be such as to save him from the imposition, but too slight, and that perhaps by design, to diminish sales to the incautious purchaser. But upon the success of fraud depends ultimately the extent of the injury."

Concerning the principal case it is to be remarked that at the time it was decided, the word "*Durham*" had been adjudged to be *publici juris* in respect of the residents of that place, a circumstance which probably reduced the question of infringement to a comparison of the two symbols. In the absence of proof of actual mistake, or other evidence of probability of confusion in the market, the conclusion arrived at was

467. Wood *v.* Sands.

1875. *U. S. C. C. Di. of Ill. — Codd. Dig.* 50.

THE plaintiff, who had established and gained a reputation for a hotel at Chicago under the name of "*Wood's Hotel*," assigned his interest therein to another person, with the exclusive use of his name, and a covenant not to open another hotel during the remainder of the lease. During the continuance of such arrangement the hotel was burnt down, and the plaintiff having subsequently repurchased the right to the use of the name "*Wood's Hotel*," and opened a hotel under that name in a different situation, the defendant opened a new hotel in Chicago as "*Wood's Hotel*," and announced the reopening of that hotel.

Action by the plaintiff for an injunction to restrain the defendant from using the name. *Held*, (1.) that the name was capable of assignment, at all events for use in connection with the premises to which it was attached; (2.) that it had passed to the plaintiff under the reassignment from his assignee, and that he was entitled to the benefit of whatever value it possessed; (3.) that the injunction must be granted to restrain the defendant from using the name.[1]

468. In re Volta Belt Co.

June 26, 1875. *U. S. Pat. Office: Thacher, Comm.* — 8 *U. S. Pat. Gaz.* 144.

ON an application for the registration of a trade-mark, consisting of a globe surrounded by clouds, from which lightning-flashes proceeded, with the words "*Electricity is life:*" *Held*, that a description of the mark in the statement on application, as being "a symbol, consisting of the words '*Electricity is Life*,' placed beneath clouds, from which lightning-flashes

a necessary one, and cannot be taken to negative the earlier case, or to affect the lucid reasoning of Judge Rives.

It is plain that some of the remarks of Judge Bynum which are quoted will not bear critical examination.

See *Amoskeag Man. Co.* v. *Spear*, **100**.

[1] See *Howard* v. *Henriques*, **108**.

proceed, the whole arranged generally as shown in the *facsimile*," was insufficient, as not clearly distinguishing between the essential and non-essential parts of the mark claimed, and, in particular, making no mention whatever of the globe.

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469. In re Vidvard and Sheehan.

June 29, 1875. *U. S. Patent Office: Thacher, Comm.* — 8 *U. S. Pat. Gaz.* 143.

On an application for the registration of a trade-mark:

Held, that the requirement of the U. S. Statute of 1870, that a declaration should be made on oath "to the effect that the party claiming protection for the trade-mark has a right to the use of the same, and that no other person, firm, or corporation has a right to such use, either in the identical form, or having such near resemblance thereto as might be calculated to deceive," was sufficiently complied with by a declaration that "no other person, firm, or corporation has a right to the use of the said trade-mark, or of one substantially the same."

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470. In re Boehm & Co.

August 24, 1875. *U. S. Patent Office: Spear, Act. Comm.* — 8 *U. S. Pat. Gaz.* 319.

On an application for the registration of the word "*Centennial*" as a trade-mark in respect of "alcoholic spirits:"

Held, that such an application for the general class of goods was sufficient, and that it was not necessary to make separate applications in respect of the several kinds of goods included in the class on which it was intended to use the mark, *i. e.* "Bourbon, wheat, and rye whiskeys, wines, brandies, gins, and bitters," except as to the last, "bitters," not being properly included in the term "alcoholic spirits."

471. In re Glines.

1875. *U. S. Patent Office: Spear, Act. Comm.* — 8 *U. S. Pat. Gaz.* 435.

THE words "*Slate Roofing Paint*" admitted to registration as a trade-mark on paint, on the ground that, though the words might be suggestive of qualities of the paint, they were not, properly speaking, descriptive of its composition or use.

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472. Meneely *v.* Meneely.

September, 1875. *N. Y. Sup. Ct.* — *N. Y. Sup. Ct.* (1 *Hun*) 663; 2 *Thomp. & C.* 540. *N. Y. Ct. of App.* — 62 *N. Y.* (17 *Sickels*) 427; 20 *Amer. Rep.* 489; 2 *Am. L. T. N. S.* 482.

THE plaintiffs and their predecessors in business having long manufactured bells at Troy, New York, and sold them with the inscription cast on them, "*Meneely's, West Troy, N. Y.*," the defendants made bells at the same place, and stamped them "Meneely and Kimberly, Troy, N. Y."

Injunction to restrain the defendants from using the name "Meneely" on their bells refused, on the ground that the defendants were entitled to use their own names without fraud, and that no attempt at fraud was proved.

Per Rapallo, J. (62 N. Y. 427). "Every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do anything calculated to mislead. Where the only confusion created is that which results from the similarity of the names, the courts will not interfere." [1]

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473. In re Green.

September 27, 1875. *U. S. Patent Office: Spear, Act. Comm.* — 8 *U. S. Pat. Gaz.* 729.

THE words "*German Sirup*" admitted to registration as a trade-mark, on the ground that the word "*German*" was

[1] See *Burgess* v. *Burgess*, 117.

not used as descriptive of a German product, but was a purely arbitrary term.[1]

474. The Tucker Manufacturing Co. *v.* Boyington.

October, 1875. *U. S. C. C. Dt. of N. Ill.: Blodgett, J.* — 9 *U. S. Pat. Gaz.* 455.

THE plaintiff company manufacturing the "*Tucker Spring-Bed*" under an expired patent, and having registered a trade-mark consisting of a picture of the bed, the monogram "*T. M. Co.*," and the words "*Tucker Spring-Bed*," the defendant manufactured a similar bed, and used a label containing a picture of the bed and the words "*Tucker Spring-Bed.*"

Motion by the plaintiffs for an injunction to restrain the defendant from infringing the plaintiffs' rights refused, on the ground that the right to use the name and represent the bed had become common property on the expiration of the patent, and that the combination registered by the plaintiff company had not been used by the defendant, except as to such elements as were common property.[2]

475. The India-Rubber Comb Co. *v.* Meyer.

1875. *N. Y. Super. Ct.* — *Cited* 8 *U. S. Pat. Gaz.* 905.

THE plaintiff company placing the words "*The India-Rubber Comb Co.*" on combs and cases or packages of combs, the defendant used the same words on other combs, cases, etc.

Injunction granted to restrain the defendants from infringing the plaintiffs' corporate name.[3]

[1] It is difficult to understand the logic of this decision. The theoretical effect of registration was to confer an exclusive right; plainly the registrant here could hardly hope to maintain the exclusive right to use the word "*German*" in America as against exporters of Germany, who made German sirups within German jurisdiction. It is quite obvious that the German manufacturer would have the better right to the word, although not an exclusive right.

[2] See *Singer Man. Co.* v. *Wilson*, 477.

[3] The assumption that the words "*India-Rubber Comb Co.*" were decided to be a trade-mark was erroneous; the words are obviously descriptive.

476. In re India-Rubber Comb Co.

November 24, 1875. *U. S. Patent Office: Spear, Act. Comm.* — 8 *U. S. Pat. Gaz.* 905.

THE words "*The India-Rubber Comb Company of New York*" admitted to registration as a trade-mark, on a rehearing, after a previous refusal, on the ground that the words were established to be the applicants' trade-mark by the decision of the Superior Court of New York in *India-Rubber Comb Co.* v. *Meyer;* and that although registration of the mere name of a person, firm, or corporation was forbidden by the U. S. Statute of 1870, yet such a name might be registered as being "a lawful trade-mark rightfully in use on the 8th July, 1870." [1]

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477. The Singer Manufacturing Co. *v.* Wilson.

December 14, 1875; March 25, 1867; December 13, 1877. *Jessel, M. R.* — 2 *Ch. D.* 434; 45 *L. J. Ch.* 491; 34 *L. T. N. S.* 858; 24 *W. R.* 1023. *Ct. of App.: James, Mellish & Baggallay, L. JJ.* — 2 *Ch. D.* 448; 45 *L. J. Ch.* 490; 34 *L. T. N. S.* 863; 24 *W. R.* 1026. *H. of L.* — 3 *App. Cas.* 376; 47 *L. J. Ch.* 481; 38 *L. T. N. S.* 303; 26 *W. R.* 664.

THE plaintiffs being manufacturers of sewing-machines under various patents since expired, who placed on their machines the words "*The Singer Manufacturing Company*," and also a trade-mark consisting of an ellipse containing a shuttle and needles, crossed with a line of cotton in the form of an S, and the words and letters "*Trade-Mark*," "*The Singer M. F. G. Co., N. Y.*," and who alleged that their machines had become generally known as the "Singer," or "Singer's" machines; the defendant, who manufactured sewing-machines on the principles of a variety of expired patents, began to use, among others, the patents formerly owned by the plaintiffs and their predecessors in business, and, by his agents and his price-lists, etc., described such machines as "*Our Singer Machines*," and placed on them his trade-mark, consisting of a brass plate representing St. George and the Dragon, within the words

[1] See *preceding case.*

"*Newton, Wilson & Co., Manufacturers, 144, High Holborn,*" arranged in a circle, and he alleged that the name "*Singer,*" or "*Singer's,*" was indicative of an article made on the principle of construction which he asserted to run through all the plaintiffs' patents, though they varied in minor particulars, and not of an article made by the plaintiffs.

Suit by the plaintiffs for an injunction to restrain the defendant from using the name "*Singer*" or "*Singer's*" in connection with his machines.

Held, by the M. R. and Ct. of App., upon the plaintiffs' evidence alone: (1.) that where a name or device is affixed to an article, or to a wrapper or vessel in which it is contained, thus becoming a trade-mark proper, it is not necessary, to constitute an infringement, for actual fraud to be proved; (2.) that where a trade name is used in respect of an article, but is not placed upon it, actual fraud must be proved for there to be infringement; (3.) that the present case falling into the second class, and the plaintiffs producing no evidence of actual fraud, the injunction must be refused; (4.) and that, this being so, it was unnecessary to inquire whether the name was indicative of the plaintiffs' make, or of a principle of construction.

Held, by the H. of L.: (1.) that, whether the name is or is not affixed to the article, it is not necessary, to constitute infringement, for actual fraud to be proved, if it is established that the defendant has acted in a way calculated to deceive; (2.) that, in the case in question, the plaintiffs had shown a *primâ facie* case, but that, the plaintiffs' evidence only being before their lordships, they were not in a position to decide finally whether the name "*Singer*" or "*Singer's*" was really indicative of the plaintiffs' manufacture, or of a principle of construction, or whether the defendant had acted in a way calculated to deceive; (3.) and, therefore, that the case must be remitted to the court below for decision upon the whole of the evidence.

Per Lord Cairns, C. (3 App. Cas. 389). "It may well be that, if an imitated trade-mark is attached to the article manufactured, there

will, from that circumstance, be the certainty that it will pass into every hand into which the article passes, and be thus a continuing and ever-present representation with regard to it; but a representation made by advertisements that the articles sold at a particular shop are articles manufactured by A. B. (if that is the legitimate effect of the advertisements, which is a separate question), must, in my opinion, be as injurious in principle, and may possibly be quite as injurious in operation, as the same representation made upon the articles themselves."

P. 391. "I wish to state in the most distinct manner that, in my opinion, fraud is not necessary to be averred or proved in order to obtain protection for a trade-mark." "A man may take the trade-mark of another ignorantly, not knowing it was the trade-mark of the other; or he may take it in the belief, mistaken but sincerely entertained, that in the manner in which he is taking it he is within the law, and doing nothing which the law forbids; or he may take it, knowing it is the trade-mark of his neighbor, and intending and desiring to injure his neighbor by so doing. But in all these cases it is the same act that is done, and in all these cases the injury to the plaintiff is just the same. The action of the court must depend upon the right of the plaintiff, and the injury done to that right."

Per Lord O'Hagan (p. 396). "If a man has acquired legitimately a right to the property in an exclusive use of a name, it is of small account to him, should it be invaded, whether the invasion comes from a purpose to deceive, or from ignorance, or inadvertence, or an honest misconception of the relative rights of the parties, and the law ought not to permit, and will not permit, the continuance of the invasion, whatever may have been its origin."[1]

[1] There can be no doubt that the name which has been used during the life of a patent to distinguish a patented article is to be regarded as a trade-mark, if the facts show that it indicates origin; if they show that the name is, in a just sense, descriptive, it will, like other descriptive names, be treated as *publici juris*. The cases are not at variance with each other in respect of principles; but different courts have reached different conclusions of fact.

See *Singer Manufacturing Co.* v. *Brill*, 675; *Same* v. *Larsen*, 662.

478. Tallcot *v.* Moore.

December, 1875. *N. Y. Sup. Ct.* — 13 *N. Y. Sup. Ct.* (6 *Hun*) 106.

THE plaintiff sold certain medicines under the name of "*The Magic Cure*," and described their virtues in a small pamphlet with a red cover, ornamented with a group of figures, and entitled "*The Little Red Book, New Series*, 1875;" the defendant sold other medicines under the name of "*Moore's Pillules*," and published a book in a red paper cover, entitled "*The Red and White Book*," the words "*Red Book*" being in red letters, but with no figures on the cover, the contents being much the same as those of the plaintiff's book.

Injunction, which had been granted to restrain the defendant from infringing the plaintiff's rights, dissolved, on the ground that deception was not probable, but an intention to deceive being held to be perceptible, no costs given of the appeal, nor of a motion in the court below to vacate the injunction.[1]

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479. Phelan *v.* Collender.

December, 1875. *N. Y. Sup. Ct.* — 13 *N. Y. Sup. Ct.* (6 *Hun*) 244.

THE defendant being the surviving partner of the firm of "Phelan and Collender," billiard-table makers, and having purchased from the executors of his deceased partner the interest of the latter in the partnership property, patents, trademarks, etc., described himself as "*H. W. Collender, Successor to Phelan and Collender*," and his billiard-tables as "*Phelan and Collender's Standard American Tables.*"

Suit by the son of the deceased partner, himself a billiard-table maker, for an injunction to restrain the defendant from so doing.

Injunction refused, on the ground that the plaintiff had no more right than any other person of the same name had to interfere with the defendant's use of his father's name, and, chiefly, that the defendant had not acted with any intent to deceive, or otherwise than he was entitled to do.

[1] See *Hogg* v. *Kirby*, 10.

480. In re Kane & Co.

December 27, 1875. *U. S. Patent Office: Duell, Comm.* — 9 *U. S. Pat. Gaz.* 105.

APPLICATION for the registration of "galvanized iron hoops placed on a barrel of a dark color," as a trade-mark in respect of spirituous liquors, refused, on the ground that such hoops had long been used on barrels, and that, even if the applicants were the first to use them on barrels of spirits, they would convey no distinctive idea.[1]

481. Faber *v.* Hovey.

December 30, 1875. *N. Y. Sup. Ct.* — *Codd. Dig.* 79, 249.

ACTION by the plaintiff for an injunction to restrain an infringement of his trade-mark on lead-pencils.

Held, (1.) that the word "*Star*" was a good trade-mark; (2.) that there was no error in an assessment of damages by the referee, in which he found that the damages were equal to the profits which the plaintiff would have made from the manufacture and sale of the same number of articles as the defendant had sold under the spurious mark.[2]

482. Republic of Peru *v.* Reeves.

January 3, 1876. *N. Y. Super. Ct.* — 40 *N. Y. Super. Ct.* (8 *J. & S.*) 316.

AN injunction having been granted and continued until further order, in 1873, without opposition by the defendant, to restrain an infringement of the plaintiffs' trade-marks on guano, and the defendant having died in 1874:

Motion by his administratrix, in 1875, to have the action continued against herself as such administratrix, refused, on the ground that it was not shown that the defendant had acquired any rights in the litigation, or that his estate would be prejudiced by the action not being continued.

[1] See *Williams* v. *Johnson*, **150**; *Moorman* v. *Hoge*, **373**.

[2] This case was affirmed in the Court of Appeals by a divided court. See *Graham* v. *Plate*, **347**.

483. Hennessy *v.* Wheeler.

January, 1876; April 10, 1877. *N. Y. C. P.: Robinson, J.* — 51 *How. Pr.* 457. *N. Y. Ct. of App.* — 69 *N. Y.* (24 *Sickels*) 271; 15 *Alb. L. J.* 454.

ACTION by the plaintiffs, brandy manufacturers and importers, for an injunction to restrain an infringement of their trade-mark placed upon the bottles containing their brandy, being nominally "quart" and "pint" bottles.

Held, by the Common Pleas, that the action must be dismissed, on the ground that the plaintiffs were themselves guilty of misrepresentation in selling, as quart and pint bottles, bottles which contained less, the deficiency amounting to about 7–30ths.

Held, by the Court of Appeals, that the bottles were not sold by the plaintiffs or others as measures of capacity, but were of the ordinary sizes used in the trade, the capacity of which was generally understood; that there was no evidence that any one had been or was likely to be deceived; that the plaintiffs were, therefore, not disentitled, and that a new trial must be granted.

484. Frese *v.* Bachof. (1.)

January, 1876. *U. S. C. C. S. Dt. of N. Y.: Johnson, J.* — 13 *Bl. C. C.* 234.

THE plaintiffs selling tea in packets labelled "*J. C. Frese & Co., Hopfensack, 6, Hamburg*," the defendant sold tea in packets similarly labelled.

Suit for an injunction to restrain the defendant from infringing the plaintiffs' rights. On motion for preliminary injunction:

Held, (1.) that an injunction must be granted to restrain the defendant from using the name "*J. C. Frese & Co.*," and from using on his labels the words "*J. C. Frese & Co., Hopfensack, 6, Hamburg*," notwithstanding that he claimed to have discontinued the use of the name and label; (2.) but that a preliminary injunction to restrain the defendant from

making up his tea in packages of the same size, shape, and color as the plaintiffs', must be refused, the defendant's labels containing his own name in distinct characters, and the plaintiffs showing no exclusive right to the size, etc., of their packages.[1]

485. Peltz *v.* Eichele.

January, 1876. *Missouri Sup. Ct.* — 62 *Mo.* (21 *Post*) 171.

THE defendant, having covenanted with the plaintiffs or their assignors, on the sale to them of his match business in St. Louis, with the good-will, trade-marks, etc., and the trade names of "*A. Eichele*," and "*A. Eichele & Co.*," that he would not resume the manufacture of matches at St. Louis, or in any other place, for five years, or assist others in so doing, set up as a manufacturer of matches in St. Louis, within the five years, under the name of "*P. Eichele & Co.*," and diverted customers of the plaintiffs.

Held, (1.) that the covenant was good, at all events as far as regarded St. Louis, and that a breach had been committed; (2.) that the measure of damages was the loss occasioned to the plaintiffs by the breach of covenant, and not the defendant's profits, though the defendant's profits were one element to be considered in ascertaining what the plaintiffs had lost.

486. In re The American Lubricating Oil Co.

February 2, 1876. *U. S. Patent Office: Duell, Comm.* — 9 *U. S. Pat. Gaz.* 687.

APPLICATION for the registration of the word "*Star*" as a trade-mark on oil, refused, on the ground that there was already registered in another name, for use upon the same class of goods, a device representing a star, containing the letter "*G*," and that the use of the word "*Star*" by the applicants would be calculated to deceive the public, inasmuch

[1] The decision in this case upon final hearing, 603, fully recognized complainants' exclusive right to use their style of package. See *Williams* v. *Johnson*, 150.

as their oil, as well as that of the parties already registered, would acquire the name of "*Star Oil.*"

487. Weston *v.* Ketcham. (2.)

February, 1876. *N. Y. Super. Ct.: Sedgwick, J.* — 51 *How. Pr.* 455.

MOTION by the plaintiffs in *Weston* v. *Ketcham* (1.), for an injunction to restrain the defendants in that case from selling "*Pepper's Signal Oil*," refused, on the ground (1.) that the plaintiffs showed no title to the trade-mark or name superior to that of the defendants; (2.) that the agreement between the plaintiff Weston and the widow of the inventor could add nothing to the plaintiffs' rights, since the widow could acquire no right to the trade-mark in gross, and had succeeded to no business to which it was attached;[1] (3.) that the allegation that the defendants sold as "*Pepper's Signal Oil*" that which was not so gave the plaintiffs no cause of action.

"There is no such thing as a trade-mark 'in gross,' to use that term by analogy. It must be 'appendant' of some particular business in which it is actually used upon, or in regard to, specific articles."

488. Wylam *v.* Clarke.

February 11, 1876. *Bacon, V. C.* — *W. N.* 1876, *p.* 68.

THE plaintiffs being manufacturers of Spratt's dog biscuits, which they stamped with "*X*" and the words "*Spratt's Patent*," the defendant began to manufacture similar biscuits, but marked them with an anchor and the words "*Buffalo Meat.*"

Injunction to restrain the defendant from infringing the plaintiffs' rights refused, on the ground that the marks were not sufficiently alike to deceive, but the defendant not having proved his *bona fides* in the matter, no costs given, except as to a part of the case which the plaintiffs had abandoned.

[1] See *Witthaus* v. *Braun*, 492.

489. Coe *v.* Bradley.

February 17, 1876. *U. S. C. C. Dt. of Mass. Shepley, J.* — 9 *U. S. Pat. Gaz.* 541.

THE plaintiff, being the inventor of "*Coe's Superphosphate of Lime*," entered into a contract with the defendant, under which the latter was to have the exclusive use of the plaintiff's trade-mark, consisting of the name of the article, for a limited period, the contract providing for the payment to the plaintiff of a certain share of the profits of the business, and also that a breach of the contract by the one party should release the other from his obligations.

Suit by the plaintiff for the recovery from the defendant of the share of profits agreed to be paid to the plaintiff.

Held, that, notwithstanding that the plaintiff had broken the contract by the sale of an article under the name of "*Coe's Superphosphate of Lime*," and "*Andrew Coe's Superphosphate of Lime*," he was entitled to recover the share of profits agreed to be paid to him, but that there must be deducted from such share a sum to be assessed by way of damages for the infringement by the plaintiff of the trade-mark which the defendant had acquired the exclusive temporary right to use.

490. In re Coggin, Kidder & Co.

February 21, 1876. *U. S. Pat. Office: Spear, Act. Comm.* — 11 *U. S. Pat. Gaz.* 1109.

APPLICATION for the registration of a device, consisting principally of the word "*Haxall*" and a Maltese cross, as a trade-mark on flour, refused, on the ground that the word "*Haxall*" had for many years been the trade-mark of another firm, and that the use of the proposed trade-mark would be calculated to deceive.

491. In re Rowe & Post.

February 25, 1876. *U. S. Patent Office: Spear, Act. Comm.* — 9 *U. S. Pat. Gaz.* 496.

APPLICATION for the registration of the words "*New York Cutlery Co.*" as a trade-mark refused, on the ground that the name, having only been used by the applicants for a fortnight, had neither acquired a reputation in the market, nor been in use as an existing trade-mark on the 8th July, 1870, and that its registration was, therefore, prohibited by the U. S. Statute of 1870, as being a "mere name of a person, firm, or corporation."

492. Witthaus *v.* Braun.

March, 1876. *Maryland Ct. of App.* — 44 *Md.* 303; 22 *Amer. Rep.* 44.

THE plaintiff being a tobacco manufacturer, who had been accustomed to manufacture a certain kind of tobacco for another person, according to his instructions, and had recently purchased and had assigned to him the trade-mark used by that other person on the tobacco so manufactured, the defendants sold other tobacco under a similar trade-mark.

Suit by the plaintiff for an injunction to restrain an alleged infringement of this trade-mark by the defendants:

Held, (1.) that although a trade-mark could not be transferred in gross, since that would involve a fraud upon the public, a transfer to one who was already the manufacturer of the article was not open to objection on this ground; (2.) but that the title of the original user of the mark to its exclusive use was too doubtful for an injunction to be granted.

"Where a trade-mark is used to designate the place and the person by whom the goods are made, the right to such trade-mark passes to the purchaser upon the sale and transfer of the business and manufactory at which the goods are made.

"The mere sale of a trade-mark, apart from the article to which it is affixed, confers no right of ownership, because no one can claim

the right to sell his goods as goods manufactured by another. To permit this to be done would be a fraud upon the public. But where the trade-mark is assigned to the person who manufactured the article to which the trade-mark was affixed, there is no false representation to the public, because the tobacco is still manufactured at the same place and by the same person. It is, in fact, the same article."

493. In re Dick & Co.

March 8, 1876. *U. S. Patent Office: Duell, Comm.* — 9 *U. S. Pat. Gaz.* 538.

APPLICATION for the registration of the words and letters "*D. D. & Co.* — *Tasteless*," as a trade-mark for drugs and medicines, refused, on the ground that the adjective was either descriptive of a quality of the article, or was deceptive; and that the fact that the other elements associated with the word were unobjectionable did not constitute the combination a valid mark.

494. Hirsch *v.* Jonas.

March 12, 1876. *Jessel, M. R.* — 3 *Ch. D.* 584; 45 *L. J. Ch.* 364; *L. T. N. S.* 228.

THE plaintiff was a London cigar merchant, who imported cigars made by Genir, of Havana, and which were, at the plaintiff's suggestion, supplied to him by the latter in boxes labelled with a design of Britannia and the words "*Gloria de Inglaterra*," to which Genir added the words "*Of Joseph Genir, Manufacturer of Cigars, of Havana.*" Boxes of cigars so labelled were supplied by Genir, until shortly before the commencement of the action, to the plaintiff alone, but he had no contract with Genir for the continued exclusive or any supply of such cigars, and the defendants, being new London agents of Genir, began to sell boxes of cigars, consigned to them by Genir, similarly labelled.

Motion by the plaintiff for an injunction to restrain the defendants from so doing refused, on the ground that, although

it was possible for a trade-mark to indicate selection by a person of reputation in that capacity, all that was indicated by the trade-marks in question was that the cigars were of Genir's manufacture, and that there was no contract between Genir and the plaintiff securing to the latter the exclusive sale of the cigars.

495. Mickle *v.* Emery.

March 18, 1876. *Jessel, M. R.* — *Seton, 4th ed.* 234.

On motion by the plaintiff injunction granted, upon an undertaking as to damages, to restrain an infringement of the plaintiff's trade-marks registered under the Trade-Mark Act of 1875.

496. Lautz Bros. & Co. *v.* Schultz & Co.

April 3, 1876. *U. S. Patent Office: Duell, Comm.* — 9 *U. S. Pat. Gaz.* 791.

Interference declared between the applications of the parties for registration, for the purpose of deciding to which the trade-mark, the subject of the applications, belonged.

Motion to dissolve the interference, on the ground that there was no statutory authority given to the Patent Office to declare an interference, refused, on the ground that the Commissioner of Patents was authorized to establish regulations for the conduct of proceedings in the Patent Office, and that this was sufficient to empower him to direct an interference in a trade-mark case.

497. In re Rohland.

April 6, 1876. *U. S. Patent Office: Doolittle, Asst. Comm.* — 10 *U. S. Pat. Gaz.* 980.

On an application to register the words "*Dr. Lobenthal's Essentia Antiphthisica*," as a trade-mark on a medical composition:

Held, that the words were not merely descriptive of the article, and registration granted.

498. Robineau *v.* Charbonnel.

May 4, 1876. *Malins, V. C.* — *W. N.* 1876, *p.* 160; *L. J. Notes of Cas.* 1876, *p.* 104.

THE plaintiff, carrying on business as a confectioner in Paris, under the style of "*Maison Boissier*," the defendants, who had been principal *employés* in the plaintiff's establishment, set up business in Bond Street, and placed in their window the words "*Ex 1ères de la Maison Boissier de Paris*," the words "*Ex 1ères de la*" being in very small letters.

Injunction to restrain the defendants from infringing the plaintiff's rights refused, on the ground that, the plaintiff having no shop in England, the public would not be deceived, but no costs given, the conduct of the defendants not having been blameless.

499. Foster *v.* Megevand.

May 19, 1876. *Jessel, M. R.* — *Pemb.* 2*d ed.* 393.

INJUNCTION granted to restrain an infringement of the plaintiff's trade-mark, with an account and inquiry as to damages.

500. The Amoskeag Manufacturing Co. *v.* Garner. (2.)

1876. *N. Y. Sup. Ct.* — 4 *Am. L. T. N. S.* 176.

THE plaintiff company manufacturing *cotton goods*, but not prints, and placing on the cotton goods labels containing the word "*Amoskeag*," or the initials "*A. M. Co.*," or "*A. M. C.*," the defendant sold *prints* labelled with the word "*Amoskeag*."

Suit for an injunction to restrain the defendant from infringing the plaintiffs' rights.

Held, (1.) that the defendant had no right to use the plaintiffs' corporate name; (2.) that his intention in so doing was immaterial; (3.) that, to constitute infringement, it was suffi-

cient for there to be a probability, or even a possibility, of the public being deceived; (4.) that the injunction must be granted; (5.) but that, on account of the plaintiffs' delay in taking proceedings, no damages, account of profits, or costs, could be given.

Per Barrett, J. "The only difference between the parties on this head is as to the legal treatment of the word 'Amoskeag.' The learned counsel for the defendant says: 'It is no part of our claim that Mr. Jones can use Mr. Baker's name on Mr. Jones's goods.' And he adds: 'If a baker puts forth a "Boston" cracker, and uses the name until it becomes a trade-mark, it does not prevent another baker from putting out a "Boston Roll," or a "Boston Pie," or a "Boston Plum-Pudding."'

"But now suppose that the plaintiff had received from the Legislature of New Hampshire the name of 'The Amoskeag Baking Company,' and for forty years had been engaged in the humbler, though hardly less useful, avocation of 'manufacturing' almost every variety of bread, roll, muffin, cracker, biscuit, cake, and pie, on which articles of food it had invariably stamped its corporate name, or some abbreviation thereof, such as 'Amoskeag B. Co.,' or 'Am. Baking Co.,' or 'Am. B. Co.,' or '*Amoskeag*'! Suppose, however, that the plaintiff had omitted, or had not yet decided, to make and vend the single variety known as 'Crumpets,' and thereupon a rival baker attempted to sell his crumpets as 'Amoskeag Crumpets,' would not any customer, upon seeing the name thus applied, naturally say that the Amoskeag Baking Company had added crumpets to its other varieties of bread? And would not the rival bakery be restrained — upon the plain principle of an unauthorized use of the company's name? The parallel is not precise, as the printing of calicoes may require some additional machinery. But the difference is only in degree."

501. In re Weaver.

June 6, 1876. *U. S. Patent Office: Duell, Comm.* — 10 *U. S. Pat. Gaz.* 1.

An alternative trade-mark, consisting either of the figure of a lion, or of the word "*Lion*," or of both, admitted to registration, on the ground that the above were merely three forms of the same trade-mark.

502. Filkins *v.* Blackman.

June, 1876. *U. S. C. C. Dt. of Conn.: Shipman, J.* — 13 *Bl. C. C.* 440.

JONAS BLACKMAN, the inventor of a medicine which he called "*Dr. J. Blackman's Genuine Healing Balsam*," having assigned to M. L. Filkins, for ten years from January 1, 1866, the exclusive right to manufacture the medicine under that name, on certain terms, with a proviso that if M. L. Filkins complied with those terms for the ten years, the right should be continued for a further period of fifty years, the defendant, being the son of Jonas Blackman, began, after the expiration of the ten years, to make and sell a medicine under the same name.

On motion by Filkins Brothers injunction granted to restrain the defendant from so doing; and *Held*, (1.) that the name was a good trade-mark; (2.) that the assignment was a good transfer of the right to use it on the same goods, though it would give no right to it as used on different goods; (3.) that after the assignment the original inventor could give no right in the name to the defendant; (4.) that the fact that M. L. Filkins had his brother as a co-plaintiff was no defence, since the trade-marks of a person entering into a partnership became partnership property.

"The right to the use of a trade-mark cannot be so enjoyed by an assignee, that he shall have the right to affix the mark to goods differing in character or species from the article to which it was originally attached."

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503. American Grocer Publishing Association *v.* Grocer Publishing Co.

June, 1876. *N. Y. Sup. Ct.* — 51 *How. Pr.* 402.

ACTION by the plaintiffs for an injunction to restrain the publication of a newspaper in imitation of their paper, "*The American Grocer*."

Motion by the plaintiffs to continue *pendente lite* an injunction which had been granted refused, on the ground that there

was not such similarity between the papers as to justify the court in deciding in the plaintiffs' favor on motion, and that the balance of convenience was against the continuance of the interlocutory injunction.[1]

504. In re Lawrence & Co.

June 20, 1876. *U. S. Patent Office: Duell, Comm.* — 10 *U. S. Pat. Gaz.* 163.

APPLICATION for the registration of the German words "*Für Familien Gebrauch*," and "*Lawrence Feiner Familien Flannel*," signifying respectively "*For Family Use*," and "*Lawrence Fine Family Flannel*," as trade-marks on flannel goods, refused, on the ground that they were mere words in common use and not distinctive.

505. Ex parte Stephens [T. M. A. 1875]. (1.)

June 21, 1876. *Jessel, M. R.* — 24 *W. R.* 819; 1 *Trade-Marks*, 13.

APPLICATION having been made for the registration of a trade-mark under the T. M. A. 1875, and the registrar having declined to register the proposed trade-mark as not being within the act:

On motion by the applicant for directions as to the proper mode of applying to the court, so as to obtain the registration of the proposed trade-mark: *Held*, that the proper mode of applying for the opinion of the court was by way of motion to rectify the register by the insertion of the applicant's name as the proprietor of the trade-mark, two clear days' notice being given to the Registrar of Trade-marks, and the application being supported by an affidavit by the applicant, stating the facts.

[1] See *Hogg* v. *Kirby*, 10.

506. In re Bush & Co.

June 21, 1876. *U. S. Patent Office: Duell, Comm.* — 10 *U. S. Pat. Gaz.* 164.

APPLICATION for the registration of the words "*Centennial, Isidor Bush & Co., St. Louis, Mo.*," in combination with the applicants' already registered trade-mark and the obverse and reverse of the centennial medal, as a trade-mark on sparkling wines, refused, on the ground that the word "*Centennial*" had already been registered in another name for alcoholic spirits, which would to some extent include wines, and that the obverse and reverse of the centennial medal had been registered in a third class, and that purchasers would not be likely to be deceived.

507. In re The Rubber Clothing Co.

June 28, 1876. *U. S. Patent Office: Duell, Comm.* — 10 *U. S. Pat. Gaz.* 111.

ON an application for the registration of the words "*Rubber Clothing Co.*" as a trade-mark on clothing:

Held, that although the words merely composed the name of a corporation, and, therefore, came within the prohibition to register in the U. S. Statute of 1870, yet registration should be granted, as of a "lawful trade-mark rightfully in use on the 8th July, 1870," on its being satisfactorily established by affidavit evidence that the name was in actual use as a trade-mark at that date.

508. In re Simpson & Sons.

July 13, 1876. *U. S. Patent Office: Doolittle, Act. Comm.* — 10 *U. S. Pat. Gaz.* 333.

APPLICATION for the registration, as labels, of two labels, of which one consisted of the word "*Eddystone*," with a picture of a light-house and the words "*Wm. Simpson & Sons, Philadelphia, No. — yds.*," and the other of a picture

of three female figures standing near a tomb, with the words "*Wm. Simpson & Sons, Philadelphia*," refused, on the ground that they were properly trade-marks, and must be registered as such.

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509. The Apollinaris Company (Limited) *v.* Edwards.

July 13, 1876. *Bacon, V. C.* — *Seton, 4th ed.* 237.

THE plaintiffs being the exclusive importers of Apollinaris water into England, under agreement with the owners of the Apollinaris Spring in Germany, the defendants used the word "*Apollinaris*" in connection with waters other than the genuine.

On motion by the plaintiffs injunction granted to restrain the defendants from so doing.[1]

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510. Ex parte Stephens [T. M. A. 1875]. (2.)

July 28, 1876. *Jessel, M. R.* — 3 *Ch. D.* 659; 46 *L. J. Ch.* 46; 24 *W. R.* 963; 1 *Trade-Marks*, 13.

MOTION to register as a trade-mark on inks the word or combination of letters "*Aeilyton*," such word not having been used as a trade-mark before the passing of the above act, refused, on the ground that the wording of the 10th section of the above act excluded from registration a mere combination of letters, newly adopted since the act.

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511. Smith *v.* Reynolds. (3.)

July, 1876. *U. S. C. C. S. Dt. of N. Y.: Shipman, J.* — 13 *Bl. C. C.* 458.

THE plaintiff having registered a crown under the U. S. Act of 1870 as his trade-mark for paints, but not having at that time, or since, used the crown on white lead, the defendants used a trade-mark containing a crown as their trade-mark on white lead, they, or their predecessors in business,

[1] See *Apollinaris Co. v. Moore.*

having done so from about a year previous to the registration of the plaintiff's mark.

Injunction to restrain the defendants from continuing to use the crown on their white lead refused, on the ground that the registration of the plaintiff's mark for paints generally did not give him a right to interfere with the continued user by the defendants of a mark which they had acquired a right to use in connection with a particular kind of paint before the registration of the plaintiff's mark.

512. Compagnie Laferme *v.* Hendrickx.

July 20, 1876. *Jessel, M. R.*

THE plaintiffs being a Dresden company of cigarette makers, who sold their cigarettes in certain special wrappers, etc., and under the name "*Laferme*," the defendant sold other cigarettes under the same name and in similar wrappers.

Injunction granted to restrain the use of labels and wrappers imitated from the plaintiffs', but refused as to word "*Laferme*," on the ground that it was not established that the plaintiffs' predecessor in business was the first in Germany to use it.

Costs up to the motion at which the interlocutory injunction as to the wrappers, etc., was granted, given to the plaintiffs, subsequent costs to be borne by the respective parties.

513. Lea *v.* Millar.

July 26, 1876. *Jessel, M. R.* — *Seton, 4th ed.* 242.

THE plaintiffs being manufacturers of a sauce which they termed "*Worcestershire Sauce*," the defendant sold a sauce under the same name and with similar labels.

Injunction to restrain the defendant from using the name and imitating the plaintiffs' labels refused, on the ground that both the name and the style of label had been long used by sauce manufacturers other than the plaintiffs, and that the plaintiffs had publicly abandoned their old labels by the

recent adoption of a new label bearing their signature as a distinctive mark.[1]

514. Bell, Black & Co. *v.* Bell & Co.

August 1, 1876. *Bacon, V. C.*

THE plaintiffs being manufacturers of lucifer matches, who sold their matches in boxes bearing a label of deep blue and red color on a white ground, with the device of a bell, the defendants, who had sold the same article in boxes bearing a label of the same colors, but paler, with the device of a small bee-hive, diminished the difference between the labels by deepening the colors of theirs and enlarging the bee-hive.

On motion by the plaintiffs injunction granted to restrain the defendants from infringing the plaintiffs' rights.

515. In re Meikle [T. M. A. 1875].

August 7, 1876. *Hall, V. C.* — 24 *W. R.* 1067; 1 *Trade-Marks*, 22.

THE Registrar of Trade-Marks refused to register, or advertise for registration, a design accompanied by the words "*The Registered Seal of the Bonus Tea Association*," unless the word "registered" were omitted, on the ground that the Commissioners of Patents had directed him not to allow that word to appear in connection with any registered trade-mark.

On summons to rectify the register, by the insertion of the applicants' name as proprietors of the unaltered mark, adjourned into court:

Held, (1.) that an order could not be made for the registration of the trade-mark without the preliminary advertisement required by the rules being inserted in the official journal; and (2.) that the court would not interfere with the directions given to the registrar by the Commissioners of Patents in their discretion, or direct an advertisement of the unaltered mark with a view to its registration.

[1] It is not to be understood that the court decided that by merely adopting a new label plaintiffs abandoned the right to protect the features which were common to both old and new.

516. In re Roach.

August 9, 1876. *U. S. Patent Office: Duell, Comm.* —10 *U. S. Pat. Gaz.* 333.

APPLICATION for the registration of the words "*Croup Tincture*" as a trade-mark on a croup medicine refused, on the ground that the words were merely descriptive.

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517. Weston *v.* Hemmons.

August 10, 1876. *Victoria Sup. Ct.: Molesworth, J.* — 2 *Vict. L. R. Eq.* 121.

THE plaintiff being the inventor of a secret medicine called "*Weston's Wizard Oil*," and the defendants having manufactured this medicine by agreement with him, after the termination of the agreement the defendants continued to use the recipe and name.

Injunction granted to restrain the defendants from using or imparting the secret recipe, and from using the name, except in respect of medicines manufactured before the termination of the agreement, but the order to be discharged if the plaintiff should fail to pay for any ingredients, etc., purchased by the defendants for the purpose of the medicine, and which would have been charged in account against the plaintiff if the connection had continued. As to certain other medicines not satisfactorily proved to have been invented by the plaintiff, or to have been sold in Victoria before the commencement of his connection with the defendants, no order made.

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518. In re Imbs.

August 29, 1876. *U. S. Patent Office: Doolittle, Asst. Comm.* — 10 *U. S. Pat. Gaz.* 463.

A DEVICE consisting of the letter "*I*" within a shield, the shield being surrounded with wheat and situated above the word "*Charm*," admitted to registration as a trade-mark, notwithstanding that two other trade-marks were already on the register, of which the one consisted of the words "*Golden*

Charm" above a monogram of the letters "*F. G. S. & Co.*," and the other of the words "*Attrition Flour*" above a shield on which were bunches of wheat, on the ground that the proposed trade-mark was not sufficiently similar to those already registered as to be calculated to deceive.

519. Orr *v.* Diaper.

November 6, 1876. *Hall, V. C.* — 4 *Ch. D.* 92; 46 *L. J. Ch.* 41; 35 *L. T. N. S.* 468; 25 *W. R.* 23.

THE plaintiffs being manufacturers of sewing thread, who sold their thread in England and abroad, including Valparaiso, under certain marks, discovered that large quantities of thread bearing marks similar to theirs had been shipped to Valparaiso by the defendants on account of other persons.

Action by the plaintiffs for discovery of the names and addresses of the consignors, and particulars and dates of the consignments of marked thread, with a view to further proceedings against the consignors. Demurrer; overruled; and *Held*, that the defendants must answer within a month.

520. Charleson *v.* Campbell.

November 17, 1876. *Ct. of Session.* — *Ct. of Sess. Cas.* 4*th Ser. IV.* 149; 14 *Scot. L. Rep.* 104.

THE plaintiff being the proprietor of "*The Station Hotel, Forres*," the defendant, who had become proprietor of "*The County and Family Hotel*," in Forres, changed its name to "*The Royal Hotel*," and afterwards to "*The Royal Station Hotel, Forres.*"

Interdict to restrain the defendant from styling his hotel "*Station Hotel*" refused, on the ground, that (1.) the name of the plaintiff's hotel was a mere descriptive title, not a specific one, and that there was no averment that the defendant had assumed his title with fraudulent intent; and (2.) the use of the word "*Royal*" by the defendant, as part of the

name of his hotel, was sufficient to distinguish it from the plaintiff's.[1]

521. Carmichel *v.* Latimer.

November, 1876. *Rhode I. Sup. Ct.* — 11 *R. I.* 395; 23 *Amer. Rep.* 481; 16 *Alb. L. J.* 73.

THE plaintiffs being A. Carmichel & Co., who had purchased the good-will of the business of Stillman & Co., woollen manufacturers, and with it the right to use the tickets or labels of that firm, bearing the name "*Stillman & Co.*," the defendants, Latimer, Stillman & Co., leased a mill formerly used by Stillman & Co., and known as the "*Seventh Day Mill*," or "*Stillman Mill*," and there began to manufacture goods similar to the plaintiffs', and to sell them ticketed with a label containing the words "*Stillman Mill.*"

On motion by the plaintiffs for an injunction to restrain the defendants from so doing:

Held, (1.) that the plaintiffs' right to use the name "*Stillman & Co.*," there being no person of that name in the firm, was doubtful; (2.) that the defendants were entitled to place the name of their mill on their goods, if they did so without fraud; (3.) that there was no evidence or probability of fraud or deception; (4.) and, therefore, that the motion must be refused.

Per Potter, J. "In some of the cases the question has been between partners, or there has been a sale of a business, to be continued by the vendee, and more or less connected with a place and the good-will of the business, and in many of these cases the sale of the trade-mark would be upheld. But where the reputation of the goods and of the name has grown out of excellence of manufacture, depending on the honesty and skill of the maker, it is more difficult to hold that it can be sold to a stranger, or that it is generally assignable."

Per Durfee, C. J. "A manufacturer has a right to attach his own name to his manufactures, even though a rival manufacturer of the same name, who has given it prestige in the market, may suffer in consequence. The resulting damage is *damnum absque injuriâ*. And

[1] See *Howard* v. *Henriques*, 108.

if a manufacturer has the right to label the products of his mill with his name, I do not see why he has not an equal right to label them with the name of that mill itself, provided the name is not unfairly assumed for that purpose, or fraudulently employed."

"There is to be noticed a peculiarity in some English cases, growing out of the practice of keeping up the name of an old mercantile firm for several generations, or successions of partners, and when no partner of the original name remained. This practice is noticed and commented on in *Hall* v. *Barrows*, **215**; *The Leather Cloth Co.* v. *The Amer. Leather Cloth Co.* **223**; and by Lord Kingsdown, in the last named case in House of Lords, mentioning instances. See, also, *Croft* v. *Day*, **77**. In such cases no one is deceived. The name and good-will are understood by the public to belong to the existing firm."

"In the present case there has been no continuation of an old firm by a gradual change of its members. There is no person of the name of Stillman in the complainants' firm, and the goods (although one of the partners was superintendent of the old firm) are made by a new firm, and in another place. The goods had (and it may be as claimed, through the skill of Carmichel) acquired a valuable reputation; but that old firm does not now exist. They do not describe themselves as successors, or the goods as made by one who was formerly superintendent, but by the old firm as if it still existed.

"It has not been claimed by the respondents that the complainants intend any deception. The facts are probably pretty well understood by the large dealers, and by the trade generally. And if we look upon the mark as having come to designate merely a quality or sort of goods, in that light the complainants would not be entitled to the exclusive use of it.

"On the other hand, the defendants hire the old mill, formerly occupied by Stillman & Co., and are making linseys there. While there is evidence that this mill was often called the 'Seventh Day Mill,' there is reliable evidence that it was also called the 'Stillman Mill.' It was leased to the defendants by that name, two years before they began the manufacture complained of. Persons of that name have been engaged in Westerly in manufacturing for many years, and there is evidence that the name of Stillman has also been applied to other mills. The defendants have a right to call their mills so, if they choose."

Per Potter, J. "The trouble is, the label of the defendants does not resemble the label of the plaintiffs closely enough to deceive any person of ordinary discernment, unless the name 'Stillman,' which is prominent in both labels, may mislead him. The plaintiffs, therefore, can have no relief unless they can show that the defendants have no right to use that name as they do use it in their labels. How can the plaintiffs do this when the surname of one of the defendants is Stillman, and when the mill where the linseys are manufactured, though it may be popularly known as the 'Seventh Day Mill,' is also properly called the 'Stillman Mill?'"[1]

522. In re The Eagle Pencil Co.

November 21, 1876. *U. S. Patent Office: Doolittle, Asst. Comm.* — 10 *U. S. Pat. Gaz.* 981.

APPLICATION for the registration of a trade-mark on pencils stated to consist essentially in the combination of a fraction with the whole number usually marked on a pencil, as $1\frac{1}{4}$ for 1, $2\frac{1}{2}$ for 2 (the figure of an eagle, or the word "*Eagle*," or other characters, being added or omitted at pleasure), refused, on the ground that the alleged trade-mark was in reality a mere indication of the quality of the article.

523. Chase *v.* Mayo.

November 23, 1876. *Mass. Sup. Ct.* — 121 *Mass.* (7 *Lathrop*) 343.

THE plaintiff being a packer and seller of fish, who was also an official inspector of fish, and who branded the parcels of fish packed by him for his private business with his official brand, the defendant branded other fish with a similar mark.

Action for damages. *Held*, that the plaintiff was not entitled to recover damages, on the ground that a public officer could not acquire any private right of trade-mark in the brand used by him in his official capacity.

[1] See *Kidd* v. *Johnson*, **669**; *Pidding* v. *How*, **60**; *Bury* v. *Bedford*, **222**.

524. Booth *v.* Jarrett.

November, 1876. *N. Y. C. P.: Van Brunt, J.* — 52 *How. Pr.* 169.

THE plaintiff being Edwin Booth, who had established a theatre in New York and called it "*Booth's Theatre*," and who had assigned the lease to J. B. Booth, under whom the defendants claimed, the premises having been described in both assignments, and also in various mortgages made by the plaintiff, as "*Booth's Theatre*," the defendants continued to call the theatre by that name.

Motion by the plaintiff for an injunction to restrain the defendants from continuing to use the name "*Booth*," in connection with the theatre, refused, on the ground that the plaintiff's name had become affixed to the establishment, and did not imply that it was conducted by him.[1]

525. Decker *v.* Decker.

November, 1876. *N. Y. Sup. Ct.: Lawrence, J.*— 52 *How. Pr.* 218.

THE plaintiffs being manufacturers of piano-fortes in New York, trading under the name of "*Decker Brothers*," the defendants, also manufacturers of pianos in New York, trading as "*Decker & Barnes*," and whose senior partner had previously been in business as "*Decker & Co.*," placed on their pianos a trade-mark consisting of the words "*The Decker Piano*," which they had registered in the U. S. Patent Office.

Motion by the plaintiffs for an injunction to restrain the defendants from so doing refused, on the ground that the defendants could not be restrained from the use of their own names, if no fraud appeared; and further, that it was doubtful whether the court was empowered to interfere with a trade-mark awarded by the Commissioner of Patents.[2]

[1] See *Howard* v. *Henriques*, 108. [2] See *Burgess* v. *Burgess*, 117.

526. Powell *v.* McNulty.

November 27, 1876. *Bacon, V. C.*

THE plaintiff manufacturing a sauce under the name of "*Yorkshire Relish*," the defendant sold another sauce under the same name. Injunction granted to restrain the defendant from so doing.[1]

527. In re Pratt and Farmer.

November 27, 1876. *U. S. Patent Office: Doolittle, Asst. Comm.* — 10 *U. S. Pat. Gaz.* 866.

APPLICATION for the registration of the figure of a fish as a trade-mark for fishing lines refused, on the ground that the figure was descriptive of the purpose of the article.

528. Cheavin *v.* Walker.

December 8, 1876; May 9, 1877. *Bacon, V. C.* — 5 *Ch. D.* 854; 46 *L. J. Ch.* 265; 35 *L. T. N. S.* 757. *Ct. of App.: Jessel, M. R.; James and Baggallay, L. JJ.* — 5 *Ch. D.* 850; 46 *L. J. Ch.* 686; 36 *L. T. N. S.* 938.

THE plaintiff being G. Cheavin, who manufactured filters on a principle patented by his father, S. Cheavin, in 1862 (but which patent lapsed in 1865), and who placed on his filters a tablet with the words "*G. Cheavin's Improved Patent Gold Medal Self-Cleaning Rapid Water Filter, Boston, England*," beneath a medallion with the royal arms and the words "*By Her Majesty's Royal Letters Patent*," the defendants, Walker, Brightman & Co., manufactured filters on the principle of the same patent, and placed on them a tablet with the words "*S. Cheavin's Patent Prize Medal Self-Cleaning Rapid Water Filter, Improved and Manufactured by Walker, Brightman & Co., Boston, England.*"

Action for an injunction to restrain the defendants from infringing the plaintiff's rights.

[1] This case affords a striking illustration of the use of a geographical name in other than a geographical sense.

Held, by the V. C.: (1.) that the plaintiff had acquired a right of trade-mark in the tablet; (2.) that this right had been fraudulently infringed by the defendants; (3.) that the plaintiff was not deprived of his right to an injunction by his reference to the lapsed patent; and (4.) that the injunction must be granted.

Held, by the Court of Appeal: (1.) that the alleged trade-mark was a mere inscription and not a trade-mark; (2.) that in any case the defendants had committed no infringement, but had merely stated the principle on which the filter was manufactured by them; (3.) that the plaintiff was disentitled by reason of his reference to the lapsed patent being such as to induce the belief that it was still in force; and (4.) that the injunction must be dissolved and the action dismissed.

Per Jessel, M. R. (5 Ch. D. 862). "You may state in so many words, or by implication, that the article is manufactured in accordance with a patent which has expired. But if you suggest that it is protected by an existing patent, you cannot obtain the protection of that representation as a trade-mark. Protection only extends to the time allowed by the statute for the patent, and if the court were afterwards to protect the use of the word as a trade-mark, it would be in fact extending the time for protection given by the statute. It is, therefore, impossible to allow a man who has once had the protection of a patent to obtain a further protection by using the name of his patent as a trade-mark."

Per James, L. J. "It is impossible to allow a man to prolong his monopoly by trying to turn a description of the article into a trade-mark. Whatever is mere description is open to all the world."[1]

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529. Dunbar *v.* Glenn.

January, 1877. *Wisconsin Sup. Ct.* — 42 *Wis.* 118.

THE plaintiff being the proprietor of a spring of mineral water, which he sold under the name of "*Bethesda Mineral Water*," styling the spring the "*Bethesda Mineral Spring*,"

[1] See *Pidding* v. *How*, 60; *Leather Cloth Co.* v. *Amer. Leather Cloth Co.* 223.

the defendants, who were the proprietors of a neighboring spring, which they alleged to contain exactly the same water, began to call their spring and water "*Glenn-Bethesda Mineral Spring*" and "*Water*," and to issue circulars using those terms, and stating that their water was "identical with Bethesda" water.

Injunction granted to restrain the defendants from using the name "*Bethesda Mineral Water*" in connection with the water of their spring, and from issuing circulars or trade-cards, etc., representing their water to be "*Bethesda*" water.

"Where the trade-mark, in its original signification, or by association, distinctively points to the origin or ownership of the article to which it is applied, it will be protected. But where it is a generic or geographical name, designating a city or district of country, or is merely descriptive of the article manufactured, and can be employed with truth by other manufacturers, it is not entitled to legal protection as a trade-mark." [1]

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530. Barrows *v.* The Pelsall Coal and Iron Company.

January 11, 1877. *Hall, V. C.*

THE plaintiffs being manufacturers of iron, which they stamped with the letters "*B. B. H.*" (the initials of the original partners in the firm — Bradley, Barrows & Hall) in Roman characters and a crown, the defendants, carrying on business in succession to Messrs. Boaz Bloomer & Sons, stamped their iron (as that firm had done) with the Roman letters "*B. B. S.*" and a crown. In 1874 the plaintiffs commenced a suit for an injunction, which was compromised, the defendants undertaking to discontinue the use of their mark. The defendants subsequently took proceedings to procure the registration of the letters "*B. B. S.*," in italic characters, with a crown, as their trade-mark under the Trade-Marks Act, 1875.

On motion by the plaintiffs injunction granted to restrain

[1] See *Congress, etc. Spring Co.* v. *High Rock Congress Spring Co.* 354.

the defendants from using or procuring the registration of the mark in question.

531. Hennessy & Co. *v.* Rohmann, Osborne & Co.

January 18, 1877. *Malins, V. C.* — 36 *L. T. N. S.* 51.

On an *ex parte* application on the part of the plaintiffs, being brandy merchants, who alleged that the defendants had obtained cases of the plaintiffs', and filled them with inferior brandy :

Interim injunction granted, to restrain the defendants from selling brandy not the plaintiffs', so as to deceive, and order made, under Order LII., Rule 3, for inspection of the defendants' premises to be made and samples taken by a proper person.

532. Grillon *v.* Guénin.

January 19, 1877. *Bacon, V. C.* — *W. N.* 1877, *p.* 14.

THE plaintiff being a manufacturer of lozenges which he sold in boxes labelled with the words "*Tamar Indien*," the defendant sold other lozenges under the name of "*American Tamar*."

Injunction granted to restrain the defendant from infringing the plaintiff's trade-mark ; and

Held, that a defence that the words "*Tamar Indien*" were merely descriptive of the composition of the plaintiff's lozenges failed.

533. Moet *v.* Clybouw.

January 20, 1877. *Jessel, M. R.*

THE plaintiffs being Moet and Chandon, wine-growers, who sold their champagne in bottles closed with corks branded with the letters "*M. & C.*" in a circle on the bottom, and the word "*England*" on the side, the defendant sold other champagne in bottles closed with corks similarly marked, claiming to use the initials in right of a firm of "*Meadows &*

Clybouw," to whose business he alleged himself to have succeeded, and claiming to use the word "*England*" as common to the trade.

On motion by the plaintiffs injunction granted to restrain the defendant from infringing the plaintiffs' rights.

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534. Dence *v.* Mason. (1.)

January 25, 1877; February 12, 1878. *Malins, V. C.* —*W. N.* 1877, *p.* 23; 1878, *p.* 42; *L. J. Notes of Cases*, 1877, *p.* 33.

THE plaintiffs having recently acquired a provision dealer's business in Little Stanhope Street, Mayfair, carried on under the name of "*Brand & Co.*," and which name was placed on all the packets of essence of beef and other preparations made by the firm; F. Mason, who had been for many years in the employ of the plaintiffs' predecessor in business, and who alleged that during that period he had been the discoverer of the essence of beef, left their service, and began to deal in the same class of goods, in partnership with one Brand as "*Brand & Mason.*" In consequence of proceedings taken by the plaintiffs, this name was changed to "*Mason & Brand*," and shortly afterwards Brand refused to continue in the partnership, or to permit the defendant to make use of his name, but the defendant nevertheless continued to trade under the name of "*Mason & Brand*," and to represent that he was the original maker of the article.

On motion by the plaintiffs for an injunction to restrain the defendant from infringing their rights, and again at the hearing of the action:

Held, (1.) that during the continuance of the partnership between Mason and Brand it was impossible to prohibit entirely the use of the latter's name in the business; (2.) but that after the retirement of Brand the defendant was not entitled to continue to use his name for the purpose of imitating the plaintiffs' name and marks, although he was at liberty to manufacture the same article as the plaintiffs under his own name; (3.) that in arranging with the proprietor of a small

shop in the same street as the plaintiffs for the exhibition on her shop-front of the words "*Agent for Mason & Brand's Essence of Beef*," the words "*Agent for*" being in small and the rest in large letters, the defendant had acted in a manner intended and calculated to deceive; (4.) that, supposing the defendant to have discovered the recipe of the essence of beef, which was not established, he was nevertheless not entitled to represent himself as the original maker, since whatever essence of beef he had made had been made by him as the servant of the plaintiffs or their predecessors, but that he might state that he had been in the plaintiffs' service, and had there learnt the recipe; (5.) and that an injunction must be granted to restrain the defendant in the particulars above mentioned.

535. Ex parte Grimshaw [T. M. A. 1875].

January 25, 1877. *Hall, V. C.* —*W. N.* 1877, *p.* 24; *L. J. Notes of Cas.* 1877, *p.* 24; 1 *Trade-Marks*, 23.

TWO applications being made for the registration of the same trade-mark:

Motion by one of the two applicants for a direction that the case should be heard on motion, and not on special case as directed by the rules, refused, on the ground that the method of procedure directed by the rules was the more convenient.

536. Linoleum Manufacturing Company *v.* Nairn.

February 1, 1877; January 30, 1878. *Hall, V. C. Chanc. Div.: Fry, J.*— 7 *Ch. D.* 834; 47 *L. J. Ch.* 430; 38 *L. T. N. S.* 448; 26 *W. R.* 463; 1 *Trade-Marks*, 291.

THE plaintiffs being manufacturers, under certain patents recently expired, of a new species of floor-cloth, which they called "*Linoleum Floor-cloth*," or "*Linoleum*," and who had used and registered as their trade-mark a device consisting of a fleur-de-lys in a lozenge, with the words "*Linoleum Floor-cloth*" and "*F. Walton's Patent*," the defendants made preparation, upon the expiration of the patents, for the manufacture and sale of a similar article, under the name of "*Linoleum*

Floor-cloth," and adopted a trade-mark entirely different from the plaintiffs', consisting of a bunch of thistles with the name "*Nairn's*."

On motion by the plaintiffs for an injunction to restrain the defendants from using the word "*Linoleum :*"

Held, by Hall, V. C., that nothing having yet been done, and the question being purely one of the right to use the word, the matter must stand over till the hearing.

At the hearing of the action :

Held, by Fry, J.: (1.) that the word "*Linoleum*," as inserted in the plaintiffs' trade-mark, did not form an essential feature of the mark ; (2.) that the word being descriptive of a substance which the defendants were entitled to make, they were entitled to use it as the name of the substance ; (3.) that the fact that the word had been previously used by the plaintiffs alone, they being hitherto patentees, did not give them an exclusive right in it, since a name appropriated to an article made under a patent was indicative in the first place of the article so made, and only in the second place of the manufacturers ; (4.) and that the injunction must, therefore, be refused.

"Until some other person is making the same article, and is at liberty to call it by the same name, there can be no right acquired by the exclusive use of a name, as showing that the manufacture of one person is indicated by it, and not the manufacture of another."[1]

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537. Ex parte Young ; Re Lemon Hart & Son.

February 3, 1877. *London Ct. of Bankruptcy : Spring Rice, Reg. for C. J.*

LEMON HART & SON, wine merchants, whose trade-mark consisted of the initials "*L. H. & S.*," having been compelled to liquidate by arrangement, and the partnership property, good-will, etc., having been sold by the trustee in the liquidation, the purchaser became bankrupt without having fully paid the purchase money.

[1] See *Burnett* v. *Phalon*, 277 ; *Singer Man. Co.* v. *Wilson*, 477.

Motion by the trustee in liquidation for an order for the payment to him of the proceeds of a sale of the trade-mark by the trustee in bankruptcy refused, on the ground that the trade-mark passed to the purchaser from the trustee in liquidation, under the assignment from the latter, and that the purchaser's trustee in bankruptcy was entitled to the benefit of it; and

Held, that the trade-mark was a chattel within sect. 15, sub-s. 5 of the Bankruptcy Act, 1869.

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538. Harrington *v.* Libby.

February, 1877. *U. S. C. C. S. Dt. of N. Y.: Johnson, J.* — 12 *U. S. Pat. Gaz.* 188.

THE plaintiff, a manufacturer of paper collars, sold his goods in small pails of ornamented tin; he was the first to put up paper collars in pails, and registered the form of the pail as a trade-mark; the defendant sold his collars in pails of the same size as those of the plaintiff, but differently ornamented.

Motion by the plaintiff for an injunction to restrain the defendant from selling his collars in pails, as being an infringement of the plaintiff's trade-mark, refused, on the ground that the form of the pail could not constitute a trade-mark, and that the registration was without effect.[1]

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539. Strahan & Co., Limited, *v.* King & Co.

February 22, 1877. *Malins, V. C.*

THE plaintiffs being the proprietors of "*The Contemporary Review*," the defendants, the publishers and an ex-editor of

[1] This case, like *Moorman* v. *Hoge*, 373, which see, has been supposed by some to point to the conclusion that the imitation of the appearance of a form or style of package will not be restrained. What the court decided was that no one could enjoy the exclusive right to use a tin-pail as a box for collars, and that the registration of such a pail as a trade-mark was therefore nugatory. The two pails were not alike, and there was no proof of actual mistake; it was manifestly impossible to grant the injunction.

See *Williams* v. *Johnson*, 150.

that periodical, made preparations for publishing a new magazine or review under the title of "*The Nineteenth Century.*"

Motion by the plaintiffs for an injunction to restrain the defendants from so doing, and from representing their new magazine to be a continuation of "*The Contemporary Review,*" and from misrepresenting the principles or objects of the latter periodical, refused, on the ground that the defendants were engaging in a perfectly fair competition with the plaintiffs, as they had a right to do, and that they had not been guilty of any misrepresentation with regard to either their own intended publication or the plaintiffs'. [1]

540. In re Barrows [T. M. A. 1875–6].

March 1, April 26, 1877. *Malins, V. C.* — 5 *Ch. D.* 353; 46 *L. J. Ch.* 450; 36 *L. T. N. S.* 291; 25 *W. R.* 407; 1 *Trade-Marks*, 122. *Ct. of App.: Jessel, M. R.; James and Baggallay, L. JJ.* — 5 *Ch. D.* 364; 46 *L. J. Ch.* 725; 36 *L. T. N. S.* 780; 25 *W. R.* 564; 1 *Trade-Marks*, 126.

On motion by Barrows & Sons, successors to Bradley, Barrows & Hall, iron manufacturers, of Bloomfield Works, Staffordshire, for the separate registration of numerous trade-marks used by them in their business, consisting respectively of the letters "*B. B. H.*" (being the initials of the former firm), and of the word "*Bloomfield*" or "*Bloom*" (representing the name of the works), used with a variety of marks indicative of quality, as "*Best,*" "*Best, Best,*" etc., or common to the trade, as the figure of a crown, of a horse-shoe, etc., and the Registrar of Trade-Marks having, by direction of the Commissioners of Patents, declined to place on the register all the combinations, but offered to register any one of them:

Held, by the V. C.: (1.) that every valid mark used before the Act of 1875 was entitled to separate registration under it; (2.) that the court was not bound by the direction of the Commissioners of Patents; (3.) that the motion must, therefore, be granted.

Held, by the Court of Appeal, that the proper mode would

[1] See *Hogg* v. *Kirby*, 10.

be to register the letters "*B. B. H.*" and the words "*Bloomfield*" and "*Bloom*," being the essential particulars, separately, a note being appended in each case, to the effect that the mark might be used either alone, or in combination with common marks, words of quality, etc., so that the various combinations would be protected by representative registration.

541. Gilman *v.* Hunnewell.

March 1, 1877. *Mass. Sup. Ct.* — 122 *Mass.* (8 *Lathrop*) 139.

THE plaintiffs having purchased from John L. Hunnewell certain medicines and the wrappers, labels, trade-marks, etc., used upon them, the defendant, Edwin Hunnewell, who had formerly been in John L. Hunnewell's employ, set up in business in the same house as the plaintiffs as "*Hunnewell & Co.*," and made and sold similar medicines with wrappers and labels similar in many respects to the plaintiffs', except that for "*John L. Hunnewell*" "*Hunnewell & Co.*" was substituted.

Injunction to restrain the defendant from infringing the plaintiffs' rights refused, on the ground, that (1.) the plaintiffs could not have a right of trade-mark in such words as "*cough remedy*," or "*a sure remedy for chronic or common cough, sore throat, and other minor throat complaints so often by neglect the forerunner of consumption;*" (2.) there was not such similarity as to be likely to deceive; (3.) no intention to defraud was proved; (4.) the circulars distributed by the defendant to his customers correctly stated his former relation to John L. Hunnewell.

"A trade-mark may consist of a name, or a device, or a peculiar arrangement of words, lines, or figures in the form of a label, which has been adopted and used by a person in his business to designate goods of a particular kind manufactured by him, and which no other person has an equal right to use. The right in a trade-mark, so applied, is recognized as property, which a court of chancery will protect by injunction.

"A mere general description, by words in common use, of a kind

of article, or of its nature or qualities, cannot of itself be the subject of a trade-mark.

"A person may have a right in his own name as a trade-mark, as against a person of a different name. But he cannot have such a right as against another person of the same name, unless the defendant uses a form of stamp or label so like that used by the plaintiff as to represent that the defendant's goods are of the plaintiff's manufacture.

"The court will not restrain a defendant from the use of a label, on the ground that it infringes the plaintiff's trade-mark, unless the form of the printed words, the words themselves, and the figures, lines, and devices, are so similar that any person, with such reasonable care and observation as the public generally are capable of using and may be expected to exercise, would mistake the one for the other." [1]

542. Kinney *v.* Basch.

March, 1877. *N. Y. Sup. Ct.: Van Brunt, J.* — 1 *Trade-Marks*, 183; 16 *Am. Law Reg. N. S.* 596.

THE plaintiff being a manufacturer of cigarettes, on which he used a label containing a device of sun's rays, the words "*St. James*," and the symbol "½," the defendants sold other cigarettes with a label containing the words "*St. James' Parish Perique Cigarettes*" (of which the words "*St. James*" were much the more conspicuous), and the symbol "½" in the same style as the plaintiff's, but the labels were in other respects different.

Injunction granted to restrain the defendants from using the device of the sun's rays, and also the symbol "½" and words "*St. James*," alleged to be the plaintiff's trade-marks, on the ground that whether the plaintiff had or had not an exclusive right in the marks, the defendants had acted so as to deceive.

Per Van Brunt, J. "The use of any words, geographical or otherwise, numerals or symbols, adopted for the purpose of defrauding the public, will be restrained by the court. It is the duty of the court

[1] See *Amoskeag Co.* v. *Spear*, 100.

to protect the public from fraud, even at the suit of a plaintiff who has not the exclusive right to the use of such words, numerals, or symbols."

"It has been urged upon the part of the defendants that geographical names cannot be the subject of a trade-mark; neither can numerals, which only serve to indicate the nature, kind, or quality of an article.

"It is true that the cases cited by the defendants sustain these propositions; but the later cases have proceeded upon different and more equitable principles in defining the grounds upon which courts of equity interfere in cases of this description.

"This interference, instead of being founded upon the theory of protection to the owners of trade-marks, is now supported mainly to prevent frauds upon the public. If the use of any words, numerals, or symbols is adopted for the purpose of defrauding the public, the courts will interfere to protect the public from such fraudulent intent, even though the person asking the intervention of the court may not have the exclusive right to the use of these words, numerals, or symbols. This doctrine is fully supported by the latest English cases; . . . . and, also, in the case of *Newman* v. *Alvord*" [282].[1]

543. Carnrick *v.* Morson.

March 22, 1877. *Bacon, V. C. — L. J. Notes of Cas.* 1877, *p.* 71; *Chemist and Druggist*, 1877, *p.* 161.

THE plaintiff, being the manufacturer of a medical compound which he called "*Lacto-Peptine*," the defendants sold a preparation in bottles labelled "*Lacto-Pepsine*."

On motion by the plaintiff injunction granted to restrain the defendants from using the name; and *Held*, that a defence that the word "*Lacto-Peptine*" was descriptive of the composition of the plaintiff's article failed.[2]

[1] See *Lee* v. *Haley*, **325**.

[2] The circumstances of this case were of an exceptional character; it is not to be regarded as a departure from the extreme views which have been repeatedly affirmed by the English courts concerning descriptive words.

544. In re Park.

March 26, 1877. *U. S. Patent Office: Spear, Comm.* — 12 *U. S. Pat. Gaz.* 2.

On an application for the registration as labels of three labels, each including a figure of a swan, or the word "*Swan*," which figure and word the applicant had previously sought unsuccessfully to register as his trade-mark on gin: *Held*, that, before this figure or word could be registered as part of a label, the applicant must establish his right of trade-mark therein.

545. Allsop *v.* Walker [T. M. A. 1875].

April 10, 1877. *Jessel, M. R.*

The defendants having applied for the registration of a device consisting of a female hand pointing horizontally, with the letters "*W. & G.*" upon it, as their trade-mark for bottled ale and porter, the plaintiffs opposed the application, on the ground that the use of the mark by the defendants, if permitted, would be calculated to deceive, by reason of the similarity between that mark and their own trade-mark on the same article, consisting of a male hand pointing upwards. Special case stated by the Registrar of Trade-Marks.

Held, that the mark too nearly resembled the plaintiffs' mark to be admitted to registration in the same class.

546. Steinthal *v.* Samson.

April 17, 1877. *Ct. of App.: James, Mellish, and Baggallay, L. JJ.*

The plaintiffs being manufacturers and exporters of cotton goods, to whom the defendant, a former partner, had, on the dissolution of the partnership, assigned all his interest in the business, the deed containing a proviso to the effect that the defendant should be at liberty to continue to carry on a similar business, and to use the trade-marks of the firm, except the private arms, crest, and motto of the plaintiffs, the motto

consisting of the word "*Excelsior*," the defendant subsequently sold cotton goods bearing that word, but not used as a heraldic device.

Injunction to restrain the defendant from the breach of the covenant alleged to be thereby committed refused, on the ground that the restrictive covenant had reference only to the heraldic use of the plaintiffs' arms, crest, and motto, and not to the use of the word "*Excelsior*" in another manner.

547. In re The Goodyear Rubber Co.

April 25, 1877. *U. S. Patent Office : Doolittle, Asst. Comm.* — 11 *U. S. Pat. Gaz.* 1062.

APPLICATION for the registration of the words "*Crack-proof*," as a trade-mark on india-rubber goods, refused, on the ground that the term was merely descriptive of quality.[1]

548. Campbell *v.* Hollins.

April 26, 1877. *Malins, V. C. House of Lords.*

THE appellant (defendant) Campbell and the respondent (plaintiff) Hollins having been in partnership as manufacturers of china and encaustic tiles, separated the two businesses in 1859, the former being styled by them "*Herbert Minton & Co.*" and the latter "*Minton, Hollins & Co.*," and the respondent (defendant) Taylor was afterwards taken into the latter firm. On the retirement of Taylor in 1868, the partnership was dissolved, Campbell taking the china business, Hollins the tile business. Taylor having subsequently begun to manufacture tiles as "*Robert Minton, Taylor & Co.*, Hollins commenced proceedings to restrain him from so doing, but these were discontinued on Taylor's undertaking not to trade in any other name than "*Robert Minton Taylor.*" Campbell purchased Taylor's business in 1875, and announced his intention of continuing it as "*The Minton Brick and Tile Co.*"

[1] See *Burnett* v. *Phalon*, 277.

Action by Hollins for an injunction to restrain the defendant Campbell from using the name "*Minton.*"

Held, by the V. C. and House of Lords, that the plaintiff was entitled, as against the defendant, to the exclusive use of the name "*Minton & Co.*" in connection with the tile business, and that an injunction must be granted to restrain the infringement of that right by Campbell.[1]

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549. Hennessy *v.* Cooper.

April 26, 1877. *Malins, V. C.*

THE plaintiffs being brandy merchants, the defendant sold his own brandy in cases formerly belonging to the plaintiffs, and still bearing their marks.

On motion by the plaintiffs injunction granted to restrain the defendant from so doing.

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550. Ledger *v.* Ray.

April 28, May 3, 1877. *Bacon, V. C. Ct. of App.: James, Baggallay, Bramwell, and Brett, L. JJ.*

THE plaintiff being the proprietor of a dramatic and sporting newspaper called *The Era*, which had for many years published articles signed "*Touchstone*," the defendant made preparations for the publication of a new newspaper on the same subjects, under the title of *Touchstone, or, the New Era.*

Action by the plaintiff for an injunction to restrain the defendant from so doing.

Held, by the Court of Appeal, that the adoption of that name for a new newspaper was not calculated to cause it to be bought in mistake for the old one, and that an injunction which had been granted must, therefore, be dissolved.[2]

[1] See *Thorley's Cattle Food Co.* v. *Massam*, 671.

[2] See *Hogg* v. *Kirby*, 10.

551. Rose *v.* Henley.

April 27, 1877. *Malins, V. C.* — *Cited* 47 *L. J. Ch.* 577; 38 *L. T. N. S.* 410.

THE plaintiff being a manufacturer of lime juice, who sold his article in bottles moulded specially for him with a spray of lime-tree leaf and blossom and his name "*Rose & Co.*," and who further placed on his bottles a label containing the same spray and name, the defendant systematically collected the plaintiff's empty bottles, and sold them refilled with lime juice not of the plaintiff's preparation. Injunction granted to restrain the defendant from infringing the plaintiff's rights.

552. Wolmershausen *v.* O'Connor.

May 3, 1877. *Bacon, V. C.* — 36 *L. T. N. S.* 921.

THE defendant (who had for many years been manager of, and for a shorter time partner in, the firm of Foster & Co., tailors, of High Street, Oxford, and Mayfair, and had latterly resided at Headington Hill, near Oxford) covenanted with the plaintiff, the principal partner, on the dissolution of the partnership, not to carry on the business of a tailor, etc., within ten miles of Oxford, and not to represent himself in any manner as having been connected in trade with the plaintiff or his firm, as partner, manager, or servant, but shortly afterwards set up a tailor's business in Cavendish Square, and issued advertisements, in which he described himself as "late of Headington Hill, Oxford, and formerly of Mayfair."

On motion by the plaintiff injunction granted to restrain the defendant from acting in breach of his covenant, and from issuing the advertisements in question.

553. In re Kimball.

May 3, 1877. *U. S. Patent Office: Doolittle, Act. Comm.* — 11 *U. S. Pat. Gaz.* 1109.

ON an application for the registration of the words "*Vanity Fair*" as a trade-mark on cigarettes, the applicant having

prepared eight different arrangements of his manner of using the words, by way of complying with the requirement of the U. S. Statute of 1870 for the manner of application to be described:

Held, that one *fac-simile* was sufficient to illustrate the method of use, and that so many varieties of arrangement could not be permitted to be filed, on account of the incumbrance that such a practice would occasion.

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554. Swift *v.* Peters.

May 8, 1877. *U. S. Patent Office: Doolittle, Act. Comm.* — 11 *U. S. Pat. Gaz.* 1110.

INTERFERENCE declared between Swift, an applicant for the registration in his name of a trade-mark on an agricultural compost, consisting of the words "*The John C. Ragsdale Ammoniated Dissolved Bone*," and Peters, in whose name the trade-mark was already registered, for the purpose of determining to whom the mark in question belonged.

Held, (1.) that Swift had acquired no title to the mark by being the first to suggest it, the title to a trade-mark depending on its adoption and use, and not on its invention; (2.) that Swift had acquired no title to the mark by user, since whatever use of the mark had been made by him he had made in the capacity of agent for the firm of Snowden & Peters; (3.) that the question whether Peters, the registered proprietor of the mark, was or was not entitled to the exclusive use of it, inasmuch as he was only one of the former members of the dissolved firm of Snowden & Peters, was a question for the courts and not for the patent office; (4.) and, therefore, that priority must be awarded to Peters, Swift never having acquired any right to the mark by adoption or user.

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555. Ex parte Barrows [T. M. A. 1875].

May 11, 1877. *Jessel, M. R.* — *W. N.* 1877, *p.* 119; *L. J. Notes of Cas.* 1877, *p.* 110.

MESSRS. BARROWS having long used as their trade-mark on

bar-iron the letters "*B. B. H.*" surmounted by a crown, and having registered that device as their trade-mark in class 5 in the first schedule to the rules, Messrs. Halton & Co., who had used the letters "*T. H. H.*" surmounted by a crown as their trade-mark on tin-plates, turn-plates, and sheet-iron, applied for the registration of that device as their trade-mark in class 5, the articles on which they had used the mark being included with bar-iron and other goods in that class.

On motion by Messrs. Barrows for a declaration that Messrs. Halton & Co. were not entitled to have the mark so registered: *Held*, that the mark in question, being an old mark, might be registered for part of a class only, and that leave should be given for the mark to be registered in class 5, for the articles on which it had been previously used only.

556. Hennessy *v.* Kennett.

May 18, 1877. *Malins, V. C.*

THE plaintiffs were brandy merchants, who sold two classes of brandy, the best being sold in cases and the other in casks.

Injunction to restrain the defendant from selling brandy, not the plaintiffs' "case" brandy, in cases branded with the latter's name and trade-mark refused, on the ground that the only occasion on which the defendant was proved to have done so was when an agent of the plaintiffs bought some of the plaintiffs' "cask" brandy of the defendant, and the defendant, at the agent's request, placed the "cask" brandy in one of the plaintiffs' cases.[1]

557. Kinney *v.* Allen.

May, 1877. *U. S. C. C. Dt. of E. Va.: Hughes, J.*— 1 *Hughes*, 106; 4 *Am. L. T. N. S.* 258.

THE plaintiff being a manufacturer of cigarettes who placed upon several varieties of his cigarettes the symbol "½" in red, and had registered the same as his trade-mark in the U. S.

[1] See *Hennessy* v. *Cooper*, 549.

Patent Office, the defendants sold other cigarettes under labels, which were essentially unlike plaintiff's, but which bore a similar symbol.

Suit for an injunction to restrain the defendants from using the symbol:

Held, (1.) that as the plaintiff had always used the symbol on cigarettes containing tobacco of two different kinds, half-and-half, and as the symbol served to indicate this, though it did not clearly express it, an injunction restraining the use of the symbol generally could not be granted; (2.) that a limited injunction should be granted, restraining the use of the symbol in the identical form, size, color, and style in which the plaintiff had used and registered it, and this, notwithstanding that the defendants had used it on a label which was in other respects quite unlike those of the plaintiff.

Per Hughes, J. "There are but two questions arising in the present case as to this numerical character ½.

"(1.) The first is, — its use by the complainant being in a critical sense merely arbitrary, as only *indicating* but not *expressing* the idea of half-and-half, but not absolutely arbitrary in a popular sense, — whether or not complainant has a right to an injunction prohibiting the use by others of the character *in any form* on wares similar to his own. On the general principle that exclusive privilege, in prejudice of general right, ought not to be upheld in cases of nicety and doubt, I think it most proper not to grant a general injunction.

"(2.) The next question is, whether the complainant has a right to the exclusive use of this trade-mark *in the form, size, color, and style*, in which he has used it upon his wares since 1873, and in which he registered it in 1875. Upon the authority of cases numerously reported, and upon principles well established, I decide that he has such a right, and will so decree; and will insert in the decree an imprint of the character ½ in the form, size, color, and style, in which an exclusive use upon his cigarettes is affirmed to the complainant." [1]

[1] See *Lawrence Man. Co.* v. *Lowell Hosiery Mills*, 676.

558. In re The Walkden Aërated Waters Co. [T. M. A. 1875–6].

June 8, 1877. *Jessel, M. R.* — 1 *Trade-Marks*, 39.

On motion to register as the applicants' trade-mark for mineral waters a newly adopted device of a cock standing on a circle, registration having been refused by the registrar, on the ground that two marks of a similar character were already on the register in respect of the same class of article:

Held, that the consent of the proprietor of one of the two registered marks having been already given, the mark might be registered on the consent of the proprietor of the other registered mark being obtained.

"The Commissioners of Patents have considered the point as to how often any new device or emblem may be registered as a trade-mark for goods or articles in the same class, and they have decided that, for the sake of distinctiveness, in no case whatever should the number of times exceed three. They have also decided that if a device is used by more than three persons it cannot be registered at all under the act, as by being used by so many persons it wants that element of distinctiveness which it is necessary for a trade-mark as defined by the act to possess. A mark that is common to several persons cannot be said to be a distinctive mark, and, therefore, cannot be registered."

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559. Societé Anonyme des Mines et Fonderies de Zinc de la Vieille Montagne *v.* Baxter.

June 12, 1877. *U. S. C. C. S. Dt. of N. Y.: Blatchford, J.* — 14 *U. S. Pat. Gaz.* 679.

The plaintiffs being manufacturers of dry white oxide of zinc, the defendants sold white oxide of zinc ground in oil, under the same trade-mark as that used by the plaintiffs.

Injunction to restrain the defendants from infringing the plaintiffs' rights refused, on the ground that the article on which the defendants used the mark was different from that on which it was used by the plaintiffs.

560. Massam *v.* J. W. Thorley's Cattle Food Co.

June 14, 1877. *Malins, V. C.* — 6 *Ch. D.* 574; 46 *L. J. Ch.* 707; 36 *L. T. N. S.* 848.

JOSEPH THORLEY having in his lifetime been a manufacturer of a compound known as "*Thorley's Food for Cattle*," which was sold in packets labelled with those words and with Thorley's signature; and Thorley's brother, J. W. Thorley, having been for many years his manager, and equally acquainted with the secret recipe of the compound; J. W. Thorley, after his brother's death, founded the defendant company for the manufacture and sale of the same article, which was sold in packets labelled with the words "*Thorley's Food for Cattle*," with a *fac-simile* of the seal of the company, composed of its name in a circle enclosing the heads of various animals, and the company also issued a prospectus stating its connection with J. W. Thorley, and containing the same directions for use as those issued by Joseph Thorley.

Motion by the executors of Joseph Thorley, who had registered the signature alone as the trade-mark of their business, for an injunction to restrain the defendants from representing their business or goods to be those of the plaintiffs, and from infringing the plaintiffs' trade-mark, refused, on the ground (1.) that J. W. Thorley was entitled to use his own name, either alone or as part of the name of a company, or in the phrase "*Thorley's Cattle Food*," in the manufacture of an unpatented article, with the recipe of which he was acquainted, provided that he acted without fraud; (2.) that the name "*Thorley's Cattle Food*" had become the common recognized designation of an article which any one might use who could produce the same article, although he might not represent it to be made by any one but himself;[1] (3.) that the article being the same as the plaintiffs', the same directions for use were correctly used; (4.) that the trade-marks of the

[1] See *Singer Man. Co.* v. *Wilson*, 477; *Thorley's Cattle Food Co.* v. *Massam*, 671.

parties, consisting respectively of the signature and seal, were entirely different.

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561. Condy *v.* Mitchell.

June 15, November 27, 1877. *Bacon, V. C.*—37 *L. T. N. S.* 268. *Ct. of App.: James, Baggallay, and Thesiger, L. JJ.*—37 *L. T. N. S.* 766; 26 *W. R.* 269.

SHORTLY after the dissolution of the firm of "*Bollmann Condy & Co.*," who carried on business as manufacturers of "*Condy's Fluid*," and "*Condy's Ozonized Water*" (those articles having been invented and formerly patented by H. B. Condy), under articles of partnership, by which the partnership profits, good-will, and property became, on dissolution, divisible in equal shares between the partners, H. B. Condy and Mitchell, Condy set up a separate business of his own as "*H. Bollmann Condy*," and Mitchell founded a company for the same purpose under the name of "*The Condy's Fluid Co.*"

Action by Condy for an injunction to restrain Mitchell from using the name "*Condy*" in the title of his company and its manufactures.

Injunction refused, on the ground, (1.) that the name "*Condy's Fluid*" had come to be the name of an article of commerce made under Condy's expired patent; (2.) that on the formation of the partnership between Condy and Mitchell, the latter acquired an equal right with the former to manufacture the article and use the name; (3.) that this was not affected by the dissolution; (4.) that Mitchell had not acted fraudulently in the adoption of the name for his company or otherwise, nor in a manner calculated to cause his article to be mistaken for the plaintiff's.[1]

[1] See *Singer Man. Co.* v. *Wilson*, 477.

562. Seabury *v.* Grosvenor.

June 16, 1877. *U. S. C. C. S. Dt. of N. Y.: Blatchford, J.* — 53 *How. Pr.* 192; 14 *U. S. Pat. Gaz.* 679.

THE plaintiffs being manufacturers of "*Benson's Capcine Plasters*," which name they had registered in the U. S. Patent Office as their trade-mark, the defendant sold other plasters under the name of "*Capsicin*."

Motion for a preliminary injunction to restrain the defendant from infringing the plaintiffs' rights refused, on the ground that the plaintiffs were disentitled by their own false representations of the origin and value of their plasters, the word "*Capcine*" being shown to be quite unknown, and not to imply any such qualities as were described by the plaintiffs, and that it was of no consequence that they had discontinued the false statements before filing their bill.

563. In re Cornwall. (1.)

June 29, 1877. *U. S. Patent Office: Doolittle, Act. Comm.* — 12 *U. S. Pat. Gaz.* 138.

A DEVICE consisting of a star and crescent admitted to registration as a trade-mark in respect of soap, notwithstanding that the figure of a star was already registered as a trade-mark on soap, on the ground that the use of the proposed mark was not calculated to deceive.

564. J. W. Thorley's Cattle Food Co. *v.* Massam.

June 30, 1877. *Malins, V. C.* — 6 *Ch. D.* 582; 46 *L. J. Ch.* 713.

THE plaintiffs in *Massam* v. *J. W. Thorley's Cattle Food Co.* began, shortly after the decision of that case, to issue advertisements of their cattle food, in which they stated that they alone were possessed of the secret recipe of the article.

Motion by the defendants in that case for an injunction to restrain the issue of such advertisements, as being detrimental to them, refused, on the authority of *Prudential Assurance Co.* v. *Knott*; but

Held, that, notwithstanding that decision, the court had now power, under the Judicature Act, 1873, s. 25, sub-s. 8, to grant an injunction in such a case. The plaintiffs' costs made costs in the cause, but the defendants to pay their own costs in any event.[1]

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565. In re Cornwall. (2.)

July 7, 1877. *U. S. Patent Office: Doolittle, Act. Comm.* — 12 *U. S. Pat. Gaz.* 312.

THE word "*Dublin*" admitted to registration as a trade-mark on soap, on the ground that the fact that the soap was not manufactured in Ireland, but in America, showed that the word was not used in its ordinary descriptive geographical sense, but as an arbitrary fancy designation.[2]

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566. Selby *v.* The Anchor Tube Co.

July 19, 1877. *Bacon, V. C.* — *W. N.* 1877, *p.* 191.

THE plaintiff and defendants having been partners in a firm of tube manufacturers, who carried on business at Birmingham as "*The Imperial Iron Tube Co.*," and at Smethwick as "*The Birmingham Patent Iron and Brass Tube Co.*," the plaintiff became entitled, on the dissolution of the partnership, under the articles of partnership, to the Smethwick premises, and the styles and good-will of the firm, and the defendants became entitled to the Birmingham premises. The plaintiff then began to carry on business on his own account as "*The Imperial Iron Tube Co.*" at new premises in Birmingham, and also at the Smethwick premises, and the defendants carried on business at the old Birmingham premises, and issued circulars headed "*The Anchor Tube Co. (late) the works of and partners and manager in the Imperial Tube Co., Gas Street, Birmingham,*" and also employed a traveller to solicit orders from the customers of the old firm.

[1] See *Thorley's Cattle Food Co.* v. *Massam*, 671.

[2] See *In re Green*, 473.

On motion by the plaintiff injunction granted to restrain the defendants from representing that they were lately the partners in the plaintiff's firm of the Imperial Tube Company, or that they had succeeded to the business of that company, or that that company had ceased to exist, and also from soliciting or executing orders on any such representations.

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567. Moet *v.* Pickering.

July 23, 1877; March 29, 1878. *Chanc. Div.: Fry, J.* — 6 *Ch. D.* 770. *Ct. of App.: James, Cotton, and Thesiger, L. JJ.* — 8 *Ch. D.* 372; 47 *L. J. Ch.* 527; 38 *L. T. N. S.* 799; 26 *W. R.* 637.

THE plaintiffs being French wine-growers, who branded on the bottoms of the corks used by them for a special quality of wine the letters "*M. & C.*," enclosed, together with a star, in a circle, and also branded the word "*England*" on the side of each cork, the defendant Pickering had consigned to him from abroad a quantity of wine having corks similarly branded to the plaintiffs', the wine being in the possession of certain wharfingers.

Action by the plaintiffs for an injunction to restrain the defendant Pickering from infringing the plaintiffs' trade-mark, and from dealing with the wine in the wharfingers' possession, and to restrain the wharfingers, who were also made defendants, from parting with the wine, except under the direction of the court, and for an order on Pickering to deliver up all spuriously marked corks, and for an account and damages from him.

Held, by Fry, J.: (1.) that the plaintiffs were entitled to the injunctions, order, and account; (2.) that the plaintiffs were entitled to a lien upon the wine for their costs in priority to the wharfingers' lien for their charges; (3.) that, the wharfingers having only submitted to act as the court should direct upon having their charges and costs paid or provided for, and it having been argued on their behalf that, even if the plaintiffs' right were established, they would not be entitled to touch the bottles for the purpose of removing the spurious

corks until the charges were paid, the wharfingers, as well as Pickering, must be made liable for the plaintiffs' costs.

Held, by the Court of Appeal, on appeal by the wharfingers: (1.) that the wharfingers were entitled to a lien on the wine for their charges, in priority to any lien of the plaintiffs for their costs, if such plaintiffs' lien existed, which was doubted; (2.) that the wharfingers had done nothing to disentitle them to their costs, and that the plaintiffs must pay such costs in both courts.

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568. In re Mitchell [T. M. A. 1875–6]. (1.)

August 2, 1877. *Hall, V. C.* — 7 *Ch. D.* 36; 46 *L. J. Ch.* 876; 26 *W. R.* 326; 1 *Trade-Marks*, 55.

MOTION to register the applicants as the proprietors of a trade-mark for steel pens, consisting of the letter "*A.*," refused, notwithstanding that the applicants and their predecessors in business had used that letter and other letters of the alphabet as their trade-marks for many years, on the ground that a single letter was not within the definition of a registrable trade-mark contained in the T. M. A. 1875, and that that definition was not extended by the Act of 1876.

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569. In re Salamon [T. M. A. 1875].

August 3, 1877. *Jessel, M. R.* — 1 *Trade-Marks*, 135.

AN application for the registration of certain trade-marks on sewing-machines, consisting respectively of the words "*Howe Sewing-Machine Company*," a monogram inscribed with the same words, and the name "*Little Howe*," having been opposed mainly on the ground that the exclusive right to use the name "*Howe*" as a trade-mark belonged to the opponents, and that the applicant had never used the name as a trade-mark, nor otherwise, except as agent for them or their predecessors in business:

On motion by the opponents for a direction as to how the case should be heard: *Held*, that the question being one of title

to the marks and their user by the applicant, one of the parties should bring an action to try the right.

"I always direct that these cases should be mentioned to the court, that I may decide the proper way in which they are to come before the court: that way depends on the circumstances in each case. If it be a simple question of law, it had better be by special case; if for directions as to carrying out the act, by summons at chambers; if of disputed facts, by motion."

570. Dence *v.* Mason. (2.)

August 8, 1877. *Malins, V. C.*

THE defendant F. Mason, in *Dence* v. *Mason* (1), having been enjoined from using the name "*Brand*" in connection with his articles, nevertheless continued to sell goods bearing the words "*Frank Mason & Co.'s* ('*Brand's*') *Essence of Beef.*" On motion by the plaintiffs defendant committed for contempt. (On December 18 he was discharged, on undertaking not to use the name "*Brand*" until the hearing of the action.)

571. In re Warburg & Co.

August 25, 1877. *U. S. Patent Office: Doolittle, Act. Comm.* — 13 *U. S. Pat. Gaz.* 44.

APPLICATION for the registration of the words "*Cachemire Milano*" as a trade-mark on silks (the words being claimed as the essential part of the mark, though used in connection with the name "*R. Savie & Co.*," and a picture of Milan Cathedral), refused, on the ground that the words were either descriptive of the quality and appearance of the article, or deceptive.

572. In re Gordon.

August 27, 1877. *U. S. Patent Office: Doolittle, Act. Comm.* — 12 *U. S. Pat. Gaz.* 517.

ON an application for the registration of a strip of leaf tobacco, intended to be wrapped round the mouth-piece of a

cigarette, and to vary with the size of the cigarette, as a trade-mark on cigarettes. *Held*, (1.) that the mere fact that the proposed trade-mark was consumed with the article to which it was attached was no objection to it; (2.) but that the proposed trade-mark was, in fact, adapted to serve a mechanical purpose rather than to distinguish the applicant's goods from others, and that, therefore, registration must be refused.

573. Prince Metallic Paint Co. *v.* Carbon Metallic Paint Co.

1877. *N. Y. Sup. Ct.* — *Codd. Dig.* 209.

THE plaintiffs manufacturing paint, on which they placed the words "*Prince's Metallic Paint*" in a special form, the defendants, being brothers of the name of Prince, manufactured a paint which they called "*Iron Ore Paint*," and sold under the words "*Prince Bros. Iron Ore Paint.*"

Motion by the plaintiffs to continue an injunction which had been granted to restrain the defendants from infringing the plaintiffs' rights, and using the name "*Prince*," refused, and injunction dissolved, on the ground that the defendants were entitled to use their own name so as not to deceive, and that the manner in which the defendants had used it was not intended or calculated to deceive.[1]

574. Ayer *v.* Rushton.

1877. *N. Y. C. P.* — *Codd. Dig.* 229.

THE plaintiff being the inventor and manufacturer of a medical preparation which he sold under the name of "*Ayer's Cherry Pectoral*," the defendant began to make lozenges, which he called "*Cherry Pectoral Troches*," and subsequently to make a liquid medicine which he put up in bottles somewhat similar to the plaintiff's, and labelled with the words, "*Cherry Pectoral, for sale, wholesale and retail, by Rushton*

[1] See *Burgess* v. *Burgess*, 117.

& Co., 11 Barclay Street, New York." He also put up over his premises a sign, with the words "*Depôt of the Cherry Pectoral Company*," and inside a notice, "*Ayer's Cherry Pectoral, One Dollar; Rushton's Cherry Pectoral, Fifty Cents. Which will you have?*" and he instructed his employees to explain the differences between the articles to customers.

Injunction which had been granted to restrain the defendant from using the words "*Cherry Pectoral*," and otherwise infringing the plaintiff's rights, dissolved; and

Held, (1.) that the defendant had only traded in competition with the plaintiff, and had not acted in a manner intended or calculated to cause his article to be mistaken for the plaintiff's; (2.) that the plaintiff could have no exclusive right in the words "*Cherry Pectoral*," since the first word described one of the ingredients in the compound, the wild cherry, and the other described the intended application of the compound, so that the whole term was common property and incapable of appropriation.[1]

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575. Helmbold *v.* The Henry T. Helmbold Manufacturing Co.

September, 1877. *N. Y. Sup. Ct.: Westbrook, J.* — 53 *How. Pr.* 453.

HENRY T. HELMBOLD, having invented an article which he called "*H. T. Helmbold's Highly Concentrated Compound Fluid Extract of Buchu*," and having become bankrupt, the plaintiff, his brother, claimed to have manufactured the article for H. T. Helmbold and his assignee in bankruptcy, and to have purchased the assignee's rights in the preparation. The defendant company was subsequently formed and assisted by H. T. Helmbold, and sold the same compound under the same name.

Motion by the plaintiff for an injunction to restrain the defendant company from so doing refused; and

Held, (1.) that the plaintiff was in any case disentitled by reason of his own false representations in continuing to use

[1] See *Lee* v. *Haley*, 325.

labels guaranteeing the personal inspection and supervision of H. T. Helmbold; (2.) that while H. T. Helmbold could himself have sold the right to use his name, a sale by the assignee in bankruptcy could not deprive him of the right to use it; (3.) that the same principle applied to his trade secret, even assuming the plaintiff to be acquainted with it, which H. T. Helmbold denied; (4.) that the remainder of the title of the preparation (exclusive of the name) was purely descriptive and incapable of appropriation.

576. Boon *v.* Moss.

September 18, 1877. *N. Y. Ct. of App.* — 70 *N. Y.* (25 *Sickels*) 465.

HALL, the proprietor of a newspaper called *The Watertown Weekly Reunion*, entered into a contract with Warren to sell to him (subject to certain conditions, including certain specified payments) "*The Watertown Weekly Reunion* printing establishment, including the presses, machinery, type of all description, newspaper and jobbing material, tools, implements, etc., appertaining to the said printing business." Warren assigned his interest under the agreement to Moss and Boon, and Hall assigned his to Flower. Boon and Moss failed after some years to make the payments, and an action was commenced between them for dissolution of partnership, etc., in which a receiver was appointed.

An action was subsequently brought, by leave of the court, by Flower against the receiver, to enforce his rights under the agreement.

Held, that the agreement between Hall and Warren being for a conditional sale, the title did not vest in the purchaser till the payments were made and conditions fulfilled; that the good-will of the business, including the name of the paper, subscription list, etc., was included in the sale; and that Flower was entitled to recover from the receiver the value of the good-will, which had been sold by him.

"The good-will of a newspaper establishment often constitutes its largest value. . . . . There is one kind of good-will which has been

said to be only a probability that customers will resort to the old place; and another, far more valuable, when a retiring partner agrees not to engage in the same business in competition with the old establishment. The good-will of a permanent newspaper establishment is generally more tangible than either." [1]

577. In re Dole Brothers.

September 20, 1877. *U. S. Patent Office: Doolittle, Act. Comm.* — 12 *U. S. Pat. Gaz.* 939.

An application for the registration of the words "*Egg Macaroni*" as a trade-mark on macaroni having been refused, on the ground that the words were either descriptive of the article, or, if no eggs were used in its manufacture, deceptive; on a renewed application based on the proviso in the U. S. Act of 1870 admitting to registration lawful trade-marks rightfully in use on July 8, 1870:

Held, (1.) that long before the adoption of the words by Pfeiffer, the applicants' assignor, in connection with his macaroni, the words were in common use; (2.) that, besides this, Pfeiffer had always used the words in connection with his own name, as "*Pfeiffer's Egg Macaroni*," and generally with a landscape picture; (3.) and that, for both these reasons, the words "*Egg Macaroni*" alone were not a lawful trade-mark rightfully in use on July 8, 1870, and that registration must, therefore, be refused.

578. In re Consolidated Fruit Jar Company.

September 20, 1877. *U. S. Patent Office: Doolittle, Act. Comm.* — 14 *U. S. Pat. Gaz.* 269.

On an application by the assignees of certain patents for screw-neck bottles and jars granted to J. L. Mason, for the registration as their trade-mark of the name "*Mason*," which they alleged that they had used on their jars, cards, circulars, etc., for many years:

Held, (1.) that the name, being the name merely of a per-

[1] See *Hogg* v. *Kirby*, 10.

son, unaccompanied by a distinctive mark, could only be registered if it were a lawful trade-mark rightfully in use on July 8, 1870; (2.) that the name was not such a lawful trade-mark, since it was the name of the inventor of a patent article attached to that article, which article the applicants had, indeed, the sole right to make, and therefore to designate by its name, until the expiration of the patents, but which article would then cease to be the exclusive property of the applicants, whereupon all makers of it would be entitled to describe it by its appropriate descriptive name; (3.) and that the application must, therefore, be refused.

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579. Colman *v.* Crump.

October 2, 1877. *N. Y. Super. Ct.* — 40 *N. Y. Super. Ct.* (8 *J. & S.*) 548. *N. Y. Ct. of App.* — 70 *N. Y.* (25 *Sickels*) 573; 16 *Alb. L. J.* 352.

THE plaintiffs being English manufacturers of mustard, which they sold in packages labelled with the device of a bull's head, the defendant, who was a label-printer, sold labels bearing bulls' heads generally similar to that used by plaintiffs.

Injunction granted to restrain the defendant from infringing the plaintiffs' rights, notwithstanding that there were points of difference between the two bulls' heads, and that the same device had long been used by other manufacturers on other classes of goods.

70 N. Y. 578. "It is not necessary that the symbol, figure, or device used, or printed and sold for use, should be a *fac-simile* or precise copy of the original trade-mark, or so close an imitation that the two cannot be distinguished except by an expert, or upon a critical examination by one familiar with the genuine trade-mark. If the false is only colorably different from the true, if the resemblance is such as to deceive a purchaser of ordinary caution, or if it is calculated to deceive the careless and unwary, and thus to injure the sale of the goods of the proprietor of the trade-mark, the injured party is entitled to relief. Neither is it necessary to establish a guilty knowledge or fraudulent intent on the part of the wrong-doer. It is suffi-

cient that the proprietary right of the party and its actual infringement are shown."

P. 580. "The fact that the same device is used upon other articles of merchandise does not take from the plaintiffs their right to its exclusive use on this one article of their manufacture." [1]

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580. McLean *v.* Fleming.

October, 1877. *U. S. Sup. Ct.* — 96 *U. S. Rep.* (6 *Otto*) 245; 13 *U. S. Pat. Gaz.* 913.

THE plaintiff (respondent) being entitled, under the will of the previous proprietor, to a druggist's business and goodwill, first established by Dr. C. McLane in or about 1834, an important part of the business consisting of the manufacture and sale of pills known as "*Dr. C. McLane's Liver Pills*," which pills were, from the year 1847, put up in boxes sealed on the top with a red seal bearing the name of the inventor, and inclosed in a certain wrapper containing, among other things, the name of the pills, the defendant (appellant), Dr. J. H. McLean, commenced a similar business in 1849, and from and after 1851, to the knowledge of the plaintiff or his predecessors in business, manufactured and sold pills under the name of "*Dr. McLean's*" or "*Dr. J. H. McLean's Universal Pills*," and placed them in boxes sealed similarly to the plaintiff's, and enclosed in wrappers of similar color and appearance, bearing the name applied by the defendant to his pills, but in 1872 he changed his wrappers, and adopted new and unobjectionable ones, on complaint made by the plaintiff.

Suit by the plaintiff for an injunction to restrain the defendant from infringing his rights, and for an account.

On appeal by the defendant from the decision of the U. S. Circuit Ct. for the E. Dt. of Missouri, awarding an injunction with a decree for the sum of $

Held: —

1. That in trade-mark cases the original invention or proprietorship of the article with which the trade-mark is connected is not in question, but that the court proceeds on the

[1] See *Farina* v. *Silverlock*, 130.

ground that the plaintiff has a valuable interest in the good-will of his business, and that in this is included the trade-mark by which his goods are distinguished.

2. That a trade-mark may consist of a name, symbol, figure, letter, form, or device, if adopted and used by a manufacturer or merchant as distinctive of his goods.

3. That even common words and phrases, not invented for the purpose, may be so adopted and used, if not previously applied to the same or similar articles.

4. That a name when so adopted and used, but not otherwise, may be a good trade-mark, as against a trader or dealer of a different name.

5. But that there is no exclusive right of trade-mark in a name, even a man's own name, as against a person of the same name.

6. But that a person will not be allowed so to use his name as to represent his goods to be those of another person of the same name.

7. That a person may have a good trade-mark for goods which he exposes for sale, though not of his manufacture, and this, although the name of the actual manufacturer is included in the device.

8. That, to constitute an infringement of trade-mark, exact similitude is not required, but that an infringement has been committed when ordinary purchasers buying with ordinary caution are likely to be misled.

9. That positive proof of fraudulent intention is not required when probability of deception has been produced.

10. That it is not necessary to prove infringement of a specific trade-mark if the defendant has acted with fraudulent intention, and has refused to change his course of conduct.

11. That an injunction will not in general be refused only on the ground of delay.

12. But that, although the injunction may be granted, yet, where there has been great delay, an account may be refused.

13. That, in the case in question, a probability of deception had been established, and the injunction must be continued.

14. And that the plaintiff must, therefore, have his costs in the court below.

15. But that, on account of the plaintiff's great laches, the account granted by the court below must be refused.

16. And that, that being so, the appellant was entitled to his costs of the appeal.[1]

[1] The points of chief importance decided by this case were: (1.) that long-protracted delay on the part of the complainant in bringing his suit will not prevent the issuance of an injunction; but (2.) that where there has been such delay an accounting will be refused.

The first of these points had been considered in numerous cases, and while, perhaps, the current of authority was strongly in favor of the view announced by the Supreme Court, there were not a few precedents of weight which made against it.

It is to be remarked that there has been a broad divergence in the United States from the rule laid down in England; and the American reader may safely dismiss from his mind whatever has been said elsewhere than in the courts of his own country.

The point is one which was necessarily brought to the surface at an early period in the history of trade-mark litigation. It was first prominently mentioned by Judge Story, who intimated that the defence was one of very doubtful force. *Taylor* v. *Carpenter*, 78. Judge Woodbury referred to it in his charge to a jury in the case of *Taylor* v. *Carpenter*, 83, decided in 1846; but, in effect, only went so far as to decide that the acquiescence must be at least for a period equal to the time fixed by the statute of limitations.

In 1849 the question arose in *Amoskeag Man. Co.* v. *Spear*, 100, and was answered by Judge Duer, who foreshadowed what may be taken to be the final disposition which was made by the federal court of last resort a quarter of a century later. Judge Duer writes as follows:—

"The allegation that there has been such an acquiescence for some years on the part of the plaintiffs, in the conduct of the defendants, as to bar the former from the relief they now seek, I cannot regard. Not only is the allegation sufficiently disproved, but I am satisfied that the doctrine of an acquiescence operating as an absolute surrender of an exclusive right is inapplicable to the case. The consent of a manufacturer to the use or imitation of his trade-mark by another may, perhaps, be justly inferred from his knowledge and silence; but such a consent, whether expressed or implied, when purely gratuitous, may certainly be withdrawn; and when implied, it lasts no longer than the silence from which it springs. It is, in reality, no more than a revocable license. The existence of the fact may be a proper subject of inquiry in taking an account of profits, if such an account shall hereafter be decreed; but even the admission of the fact would furnish no reason for refusing an injunction."

Substantially this view was adopted in *Gillott* v. *Esterbrook*, 269, and other cases, but was, for a time, unsettled by a number of decisions.

In *Amoskeag Man. Co.* v. *Garner*, 500, which arose in 1869, and which was a case where the circumstances were probably such as to prevent the issuance of an injunction whatever the conclusion in respect of the point under discussion, Judge Barnard held that an acquiescence of eight years created an estoppel which could not be overcome. During the following year, Judge

581. Carver *v.* Bowker.

November 10, 1877. *Lancaster Chanc.: Little, V. C.* — 1 *Trade-Marks*, 252.

THE plaintiffs, carrying on business at Manchester as merchants and shippers of cotton goods, on which they used certain combinations of marks, of which combinations the first consisted of a heading of specially colored stripes, certain other stripes, the number "109," the figure of a coroneted eagle, the words "*Carver Irmaos*," the initials "*R. H.*," and the name of the firm of Portuguese importers, and the other combinations were substantially the same, but with varia-

Blatchford, holding the Circuit Court of the United States for the Southern District of New York, decided in *Delaware & Hudson Canal Co.* v. *Clark*, 327, that an acquiescence of eleven years was equivalent to a license which estopped the complainants. Judge Blatchford's opinion, was followed in a number of instances; contemporaneously with which adjudications were made that tended to negative his view.

Perhaps the most marked case in this group was that of *Rogers* v. *Philp*, 352, which arose in the Supreme Court of the District of Columbia in 1872. The facts showed that the plaintiffs had permitted a promiscuous piracy of their mark for nearly a quarter of a century, which the court said was certainly fatal to their suit whatever the original character of their rights. But, although on the hearing of a motion for a preliminary injunction the views of the court had been carefully formulated at considerable length, upon the merits, a perpetual injunction was granted. Browne on Trade-Marks, § 684.

In 1876 there was a pointed return to the broader and better doctrine of Judge Duer, in a well-considered opinion by Judge Barrett, delivered in the case of *Amoskeag Man. Co.* v. *Garner*, in connection with which Judge Barnard had in 1869 arrived at a different conclusion. In closing his opinion Judge Barrett said: —

"There is, therefore, no just reason why the injunction, at least, should be refused, upon the ground of laches. It was properly refused, *pendente lite*. The plaintiff's case was not so clear as to warrant the interference of the court before the hearing upon the pleadings and proofs. As to the correctness of that interlocutory decision, there can scarcely be two opinions; that is, as to the result. Much of the reasoning upon the general merits of the case was unnecessary, and it certainly is not binding upon the Special Term, sitting to try the issues, especially as the facts fairly deducible from the testimony now before the court differ in many respects from what appeared in the *ex parte* affidavits read upon the motion.

"There must, therefore, be judgment for the plaintiff, enjoining the defendants, but without damages or account of profits, and, under all the circumstances of the case, without costs."

Whatever uncertainty existed in 1878 was set at rest by the opinion of the court in the principal case.

In *Cons. Fruit Jar. Co.* v. *Thomas*, 668, decided by Judge Nixon, holding the Circuit Court of the United States for the District of New Jersey, the rule of *McLean* v. *Fleming*, was applied upon a motion for a preliminary injunction.

tions in the number and color of the stripes, and in the number, for "109" being substituted "406," "409," "413," etc., the defendant, who carried on a similar business at Manchester, used on his goods combinations of marks resembling those of the plaintiffs.

Suit by the plaintiffs for an injunction to restrain the defendant from infringing their rights.

Held, (1.) that as to the component parts of the various combinations, the eagle and the number "109" were in common use and descriptive of quality; (2.) that, although the remaining numbers were not in common use, they could not be exclusively appropriated;[1] (3.) that the remaining parts of the combinations were distinctive of the plaintiffs' goods; (4.) that an injunction must be granted to restrain the defendant from the use of the combination marks as a whole, and also of the individual component parts, with the exception of the eagle and the numbers, on any goods to be exported for sale in the Oporto market; (5.) and that the plaintiffs were further entitled to an account of profits or to damages, the defendant not being able to establish a systematic infringement amounting to public user.

582. In re Parker.

November 13, 1877. *U. S. Patent Office: Doolittle, Asst. Comm.* — 13 *U. S. Pat. Gaz.* 323.

On an application for the registration as a trade-mark of the figure of a boy, together with certain words surrounded by a border of lines, and printed in minute squares upon a card, for the purpose of serving as a pattern for sampler-work to be wrought in the squares, and then the whole to be attached to a piece of abrasive paper and used in firing friction matches:

Held, that the combination in question was not a trade-mark but a design, inasmuch as it was not intended to be attached to an article as a distinguishing feature, but was it-

[1] See *Kinney* v. *Basch*, 542.

self the article, and, therefore, that application should have been made to patent it as a design, and that registration as a trade-mark must be refused.

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583. Twentsche Stoom Bleekery Goor *v.* Ellinger & Co.

November 15, 1877. *Malins, V. C.* — 26 *W. R.* 70.

On motion by the plaintiffs, a Dutch bleaching company, injunction granted to restrain the defendant, a commission agent, from infringing the plaintiffs' trade-marks; and

Held, (1.) that the fact that the plaintiffs' marks were not registered, and that the writ in the action was issued on a date (July 27, 1877) subsequent to the date (Jan. 1, 1877) fixed by the T. M. A. 1876, as the date before which a trade-mark must have been registered to entitle its proprietor to sue for an infringement, and before the royal assent (Aug. 15, 1877) had been given to the T. M. A. 1877, by which the time was extended to Jan. 1, 1878, did not disentitle the plaintiffs to their remedy; (2.) that the assertion of the defendant that the goods had been marked, packed, and exported without his knowledge was no defence; (3.) that the defendant must pay all the costs, though it might have been otherwise if he had submitted at once, having regard to the fact that no proper notice had been given him by the plaintiffs before the issue of their writ.[1]

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584. In re Block & Co.

November 22, 1877. *U. S. Patent Office: Spear, Comm.* — 14 *U. S. Pat. Gaz.* 235.

An application for the registration of a trade-mark having been refused, on the ground that the proposed mark did not constitute a registrable trade-mark, an application was made for the registration of an essentially different mark, which was granted, but an application for the second application to

[1] See *Millington* v. *Fox*, 63.

be considered and treated as an amendment of the original application was refused.

On an application for the return of the fee paid upon the filing of the original application as having been paid by mistake :

Held, that a fee paid upon an application could only be returned when it had been paid by actual mistake, such as when it was a payment in excess of the proper amount, or was not required by law, and that the application must be refused.

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585. Robinson *v.* Finlay.
Ward *v.* Robinson.

November 24, 1877; May 14, 1878. *Bacon, V. C.* — 9 *Ch. D.* 489. *Ct. of App.: James, Baggallay, and Bramwell, L. JJ.* — 9 *Ch. D.* 487; 39 *L. T. N. S.* 398; 27 *W. R.* 294.

A CERTAIN group of five trade-marks, consisting respectively of Robinson's name, his coat of arms, his crest, a figure of an elephant, and a varying number called a range number, together with a heading of colored threads, having been exclusively used on cotton goods, which, in the habitual course of business, were manufactured by Ward, exported by Robinson, and consigned to Galbraith, who sold them, after bleaching, at Rangoon (three of such marks having been previously used by Robinson, one, in a slightly different form, by Robinson and Galbraith, while the other one was new) ; after the interruption of the connection, Robinson continued to use the same group of marks, and Ward began to export goods bearing substantially the same marks, through Finlay.

Cross actions commenced respectively by Robinson against Finlay, and by Ward against Robinson, for an injunction to restrain the use of the group of marks.

Held, by the V. C. : That the marks were indicative of goods selected by Robinson, and exported and sold on his responsibility, and that an injunction must be granted in the first action.

Held, by the Ct. of App.: That, inasmuch as the group of marks had never been used except on goods which had passed through the hands of all the three parties (although separately some of them had been so used), the group of marks, as a whole, was indicative of goods which had passed through that particular course of trade, that neither of the parties was entitled to the exclusive use of the group, and that both actions must, therefore, be dismissed without costs.

Per Baggallay, L. J. "It being clear upon the evidence that the designs were designs in which three persons were interested for the purpose of carrying on a business or adventure in which all three were interested, it follows that, upon the termination of that adventure, none of the three could claim any title against the other." [1]

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586. In re Orr-Ewing & Co. [T. M. A. 1875–6].

November 15, 1877; June 7, 1878. *Hall, V. C.* — 8 *Ch. D.* 798; 47 *L. J. Ch.* 180; 38 *L. T. N. S.* 313; 26 *W. R.* 259; 1 *Trade-Marks*, 211. *Ct. of App.: James, Baggallay, and Bramwell, L. JJ.* — 8 *Ch. D.* 794; 47 *L. J. Ch.* 807; 38 *L. T. N. S.* 695; 26 *W. R.* 777.

An application having been made for the registration of certain trade-marks in respect of cotton goods, consisting of triangular green labels or tickets with a device in gold, being a curtain bearing an inscription and held up by supporters, the Committee of Experts at Manchester placed such marks in the second class as being not entitled to registration, on the ground that the shape and style and principal component parts of the marks were in common use in the trade, though the exact combinations were only used by the applicants.

On motion by the applicants for a declaration that the marks were true trade-marks within the Trade-Marks Registration Acts, and for a direction to the registrar to proceed with the registration:

Held, by the V. C.: That each of the tickets, looked at as a whole, was distinguishable from the other tickets in use, and that the motion must be granted.

[1] It is here ruled that a person may have a trade-mark upon goods *selected* by him. See *Godillot* v. *Hazard*, 461.

Held, by the Ct. of App.: That the Committee of Experts were constituted by the Trade-Marks Registration Acts and Rules a tribunal to decide as to the validity or invalidity of cotton marks; that their decision should not be reversed, except on proof that they had proceeded on some wrong principle, or in some improper manner; that, in the case in question, this was not established; and that the motion should have been refused.

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587. Metzler *v.* Wood.

December 17, 1877; April 1, 1878. *Malins, V. C.* — 8 *Ch. D.* 608. *Ct. of App.: James, Cotton, and Thesiger, L. JJ.* — 8 *Ch. D.* 606; 47 *L. J. Ch.* 625; 38 *L. T. N. S* 541; 26 *W. R.* 577.

THE plaintiffs being the proprietors of "*Hemy's Royal Modern Tutor for the Pianoforte*," published in a yellow cover bearing that title, the defendant employed Hemy to prepare a new edition of an obsolete work called "*Jousse's Royal Standard Pianoforte Tutor*," and published it in a gray cover with the title "*Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor*," the name "*Hemy's*" being in large and conspicuous letters.

Injunction granted to restrain the defendant from infringing the plaintiffs' rights; and

Held, by the V. C.: (1.) that the plaintiffs were not disentitled by reason of a representation that this was the 600th edition of the plaintiffs' work, it being proved to be a trade custom to style every issue of 250 copies a new edition, nor by a statement that their work was specially revised by Hemy, the words being properly interpreted to mean that it was a specially revised edition, but not to distinguish it from all previous ones in that respect; (2.) that the plaintiffs having set up claims as to copyright and gone into the internal structure of the defendant's work, but failed on that point, the defendant must pay one half, instead of the whole, of the plaintiffs' taxed costs.[1]

[1] See *Pidding* v. *How*, 60.

588. Bain *v.* Munro.

January 10, 1878. *Ct. of Session.— Ct. of Sess. Cas. 4th Ser. V.* 416; 15 *Scot. L. Rep.* 260.

ACTION to recover from the widow and executrix of a medical man a sum of money guaranteed by the defendant's husband to the plaintiff.

Held, by the Lord Ordinary (Lord Curriehill) and the court, that a sum of money paid to the defendant by way of purchase money for the good-will of her husband's medical practice, with a recommendation from herself, belonged to the defendant, and not to the estate of her deceased husband, on the ground that the good-will of a medical practice was personal and not transmissible, and that the money was, in fact, paid for the defendant's recommendation.

Per Lord Curriehill. "There is truly no such thing as good-will in the case of a business carried on by a professional man, such as a physician, surgeon, or law agent, whose success depends entirely upon his own personal skill. It is quite different in the case of a trade or manufacture, where the employer may have the possession of patents or trade secrets, or may, by long exercise of his trade or manufacture in some particular locality, have drawn together skilled artisans and attracted the custom of a district to his establishment. In such a case it is not the individual skill of the employer, but the reputation which his establishment has acquired, which creates that incorporeal, but frequently valuable, estate known as the 'good-will' of a trade. But there is no such thing in the case of a professional man. His business dies with him, and the man who comes after him in the district must depend for success upon his own exertions. It is quite true that such businesses are occasionally sold; but what is thus sold in the case of a living professional man retiring from business is truly the personal recommendation which the seller gives to his former clients or patients in favor of his successor, coupled with the predecessor's own retirement from business. But where the physician or law agent is dead, nothing of the kind can take place. He has been removed by death from all possibility of competing with the new doctor or the new solicitor, and his voice being forever silenced, he cannot give any recommendation to his clients or patients. But if the family of

the deceased professional man offer to recommend a successor to the clients or patients of the deceased on receiving a money equivalent, what is paid for is merely the recommendation of the living members of the family of the deceased."

Per the Lord Justice Clerk. "It is quite clear that a distinction has always been drawn between the good-will of a trade, where the individual skill of the trader has often less to do with the success of the undertaking than other circumstances connected with it, and a profession which is only carried on with success by means of the brain and other personal qualifications of the person conducting it. The distinction which has been drawn between these is thorough, and so the law has been laid down in these cases which have been quoted to us. The benefit derived from the exercise of a profession seems to me to be so personal to the individual exercising it that nothing can be said to transmit to the effect of being assets in the hands of an administrator."

Per Lord Ormidale. "I think it is impossible to hold that a medical man's practice can transmit, and that the value of the good-will of such a practice can be considered an asset in the deceased's executory."

Per Lord Gifford. "I think it is quite clear that there may be the good-will of the practice of a professional man as well as of a trade. You have instances of this in the case of medical men every day. It is said that this is only the case when both parties are living, the retiring doctor and his successor. But I cannot assent to this. I see nothing to prevent a medical man bequeathing his practice to a friend."

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589. In re Powell; In re Pratt, [T. M. A. 1875].

January 12, 1878. *Jessel, M. R.* — 1 *Trade-Marks*, 237.

A REPRESENTATION of a willow-pattern plate having been used by the former of the above parties since 1864 as his trade-mark on his "*Goodall's Yorkshire Relish*," and by the latter of the parties since 1868 on his "*Club Sauce*," and each of the parties having applied for the registration of the device as his trade-mark, and opposed the application of the other:

On two summonses taken out by the parties by direction of the judge and adjourned into court:

Held, that, inasmuch as each of the parties had used the mark independently and *bonâ fide* for several years, the mark should be registered in both names.

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590. Blackwell *v.* Dibrell.

January 14, 1878. *U. S. C. C. E. Dt. of Va.: Hughes, J.* — 14 *U. S. Pat. Gaz.* 633.

THE plaintiffs being manufacturers of tobacco at Durham, in North Carolina, who labelled their tobacco with the figure of a Durham ox and the words "*Durham Smoking Tobacco*" (their title being derived as stated in "*Blackwell* v. *Armistead*"), the defendants manufactured tobacco at Richmond, Virginia, and labelled it in the same way, except that the head and neck of the bull were substituted for the entire figure.

Suit for an injunction to restrain the defendants from infringing the plaintiffs' rights.

Held, (1.) that even if W. A. Wright (through whom the defendants claimed to be entitled to use the label) had, as he alleged, adopted the label used by the defendants before Green, through whom the plaintiffs claimed, had begun to use the label used by them, yet he had lost whatever rights he had in the mark by abandonment and disuse for eight or nine years from 1861;[1] (2.) that during that period of disuse the name had acquired a local signification, as indicating tobacco grown at the town of Durham; (3.) that whether the plaintiffs had or had not an exclusive right in the mark as against other manufacturers at Durham, they were at all events entitled to a remedy against the defendants, who did not carry on business at Durham, and that an injunction must be granted, with an account.

"That the right to use a trade-mark may be lost by abandonment or disuse is too clear to need argument or the support of authority."

[1] See *Blackwell* v. *Wright*, 466.

591. Siegert *v.* Findlater.

January 15, 1878. *Chanc. Div.: Fry, J.* — 7 *Ch. D.* 801; 47 *L. J. Ch.* 233; 38 *L. T. N. S.* 349; 26 *W. R.* 459.

DR. SIEGERT having in 1830 commenced manufacturing at Angostura (since 1846 renamed Ciudad Bolivar), in Venezuela, a fluid which he termed "*Aromatic Bitters*," and sold in peculiarly shaped bottles, enclosed in wrappers printed with descriptions of the virtues and uses of the preparation, in parallel columns of Spanish, English, and German, and underneath in French, the heading of the centre column being "*Aromatic Bitters, prepared by Dr. Siegert at Angostura (now Ciudad Bolivar)*," and the fluid having generally acquired the name of "*Angostura Bitters*," though not so termed by Dr. Siegert; in 1870 Dr. Meinhard began at Ciudad Bolivar to make and sell another preparation in bottles similarly shaped to Dr. Siegert's, with similar descriptions on the wrappers in the same languages similarly arranged, the heading of the centre column being "*Aromatic Bitters, prepared by Teodoro Meinhard, Ciudad Bolivar, formerly Angostura*," which inscriptions he somewhat altered in 1874, after the suit of *Siegert* v. *Ehlers*, in Trinidad, so that the new heading was "*Angostura Bitters, prepared by Teodoro Meinhard, Ciudad Bolivar, formerly Angostura*," and across the three columns the words "*Angostura Bitters*" were printed in red letters.

Action by the successors in business of Dr. Siegert, who had in 1875 removed their business to Port of Spain, in Trinidad, and thereupon somewhat varied their wrappers, adopting the term "*Angostura Bitters*" for the first time, so that the heading now ran "*Aromatic Bitters, or Angostura Bitters, prepared by Dr. Siegert, at Angostura (now at Port of Spain, Trinidad)*," and who, after the commencement of the action, again changed their wrappers, for an injunction to restrain an infringement by the English agents of Dr. Meinhard.

Held, (1.) that Meinhard had acted in a manner intended and calculated to deceive, and which had deceived; (2.) but that the plaintiff was not entitled to the exclusive use of the

term "*Angostura Bitters*," since that had become the name of an unpatented article which any one who could discover the secret recipe might make and call by its name, although it had hitherto been made by only one firm, because they alone knew the secret;[1] (3.) that a defence, based on the plaintiffs being disentitled by reason of misrepresentation in their new wrappers, failed, there being, in the first place, no substantial misrepresentation, and the label having, in the second place, not been adopted till after the commencement of the action; (4.) and, therefore, that an injunction must be granted to restrain the defendant from using the word "*Angostura*," or the words "*Angostura Bitters*," in such a way as to be calculated to deceive, but not so as to prevent their being applied to an article identical with the plaintiffs', by whomsoever made.

"It is to be observed that the person who produces a new article, and is the sole maker of it, has the greatest difficulty (if it is not an impossibility) in claiming the name of that article as his own, because, until somebody else produces the same article, there is nothing to distinguish it from. No distinction can arise from using the name of the class so long as the class consists of only one species, for then the name of the species and the name of the class will be the same."

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592. In re Farina [T. M. A. 1875]. (1.)

January 17, 1878. *Hall, V. C.* — 26 *W. R.* 261.

J. M. FARINA and his predecessors in business having long manufactured Eau-de-Cologne at Cologne, which was sold in bottles bearing a label on which was printed Farina's signature, with a peculiar flourish, and with a medallion of his family arms in the upper left-hand corner, and he having registered this label as his trade-mark in Germany and England, another manufacturer of Eau-de-Cologne, who used a label on his bottles very similar to Farina's, but having a different medallion in the corner, obtained registration in Germany, and applied for registration in England, of a medallion identical

[1] See *Siegert* v. *Ehlers*, 432.

with that contained in the plaintiff's label, asserting that it was also his own family arms.

Motion by the registered proprietor for a declaration that the applicant was not entitled to registration, and to restrain him from taking further proceedings with a view to registration, refused, on the ground that the question whether registration should be allowed must depend on whether an injunction would be granted in an action independent of the registration acts, and that in the case in question the medallion, used alone, was not so similar to the label with the medallion in the corner as to be calculated to deceive.

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593. In re Hyde & Co. [T. M. A. 1875].

January 18, 1878. *Jessel, M. R.*— 7 *Ch. D.* 724; 38 *L. T. N. S.* 777; 26 *W. R.* 625; 1 *Trade-Marks*, 245.

HYDE & CO. obtained the registration of the words "*Bank of England*," which they had used on sealing-wax for upwards of forty years as their trade-mark on that article, notwithstanding that the words had been used by various other sealing-wax makers for different periods up to thirty years, and for at least six years to Hyde & Co.'s knowledge.

On motion by other firms of manufacturers of sealing-wax for the removal of the mark from the register:

Held, (1.) that where an old mark had been used habitually by more than three firms on the same class of goods, it had become a common mark and incapable of appropriation; (2.) that this was the case with the words in question, and that the registration must, therefore, be rescinded; (3.) that Hyde & Co. having registered a mark to which they were not entitled, and having declined until the hearing of the motion to consent to the rectification of the register, they must pay the costs of the motion, notwithstanding that the firms moving in the matter had allowed the mark to be placed on the register without opposition.

594. Hinrichs *v.* Berndes.

January 18, 1878. *Jessel, M. R.—W. N.* 1878, *p.* 11; *L. J. Notes of Cas.* 1878, *p.* 11.

MOTION for an injunction to restrain the publication of certain libellous statements refused; but

Held, that if a plaintiff in an action of libel had obtained a verdict, and the libel were repeated, damages might be given at the hearing for the past libel, and at the same time its continuance in the future be restrained by injunction.

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595. Marcovitch *v.* Bramble, Wilkins & Co.

January 24, 1878. *Malins, V. C.*

ON motion to commit for contempt of court an auctioneer, who had had served on him a notice of an injunction which had been granted to restrain his firm from offering for sale a parcel of cigarettes marked with the plaintiff's trade-mark, the words "*Vanity Fair*," and who had nevertheless offered them for sale, but without success, he supposing the notice of injunction to require some further official authentication:

Held, that while the defendant had made himself liable to committal, under the circumstances, he should only be required to submit to the injunction and pay the costs.

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596. In re Hall & Co.
In re Atkinson.

February 2, 1878. *U. S. Patent Office: Doolittle, Act. Comm.*—13 *U. S. Pat. Gaz.* 229.

ON two separate applications for the registration of the name "*Calhoun*" as a trade-mark on ploughs:

Held, that although the name had, when first used, been the valid trade-mark of the firm of Calhoun and Atkinson, under the latter of whom both applicants claimed, it had since then become *publici juris* by being used by a number of

firms without opposition by the representatives of Calhoun and Atkinson, and that registration must, therefore, be refused in both cases.[1]

597. In re Horsburgh [T. M. A. 1875].

February 3, 1878. *Jessel, M. R.* — 1 *Trade-Marks*, 260.

THE registered proprietors of a trade-mark used by them on lubricating oils, and consisting of a certain device with the word "*Valvoline*," opposed an application by other oil merchants for the registration in their name of another trade-mark, consisting of an entirely different device with the word "*Valvoleum*," on the ground that it was calculated to produce deception.

On summons adjourned into court:

Held, (1.) that each of the words in question was simply equivalent to "*Valve Oil*," and, therefore, merely descriptive of the use of the article and incapable of appropriation, although, if the words were ornamented in some special manner, the manner of ornamentation might be claimed; (2.) that the devices used in combination with the words being perfectly distinct, each might be registered with or without the additional word, the device being the essential particular, which must be encroached upon for the trade-mark to be infringed; (3.) that the enactment in § 6 of the T. M. A. 1875, forbidding the registration of any words the exclusive use of which would not, by reason of their being calculated to deceive or otherwise, be deemed entitled to protection in a court of equity, has reference to deceptiveness inherent in the mark itself, and not to any question of comparison or similarity between two or more trade-marks.[2]

598. Ex parte the King of Saxony [T. M. A. 1875].

February 7, 1878. *Hall, V. C.* — 1 *Trade-Marks*, 245.

THE King of Saxony being the proprietor of certain long-established marks for porcelain, which had been registered in

[1] See *McLean* v. *Fleming*, 580.

[2] See *Burnett* v. *Phalon*, 277.

England, opposed an application by another person for the registration in the latter's name of certain marks for porcelain, on the ground that they so nearly resembled his own registered marks as to be calculated to deceive.

On an *ex parte* application on behalf of the King of Saxony for a direction as to the mode of trial:

Held, that the case should be heard on motion, but that leave should be given to the other party to give notice of motion for the following week to have the case heard in some other way, if he wished to do so.

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599. Braham *v.* Beachim. (1.)

February 12, 1878. *Chanc. Div.: Fry, J.* — 7 *Ch. D.* 848; 47 *L. J. Ch.* 348; 38 *L. T. N. S.* 640; 26 *W. R.* 654.

THE principal plaintiff, Countess Waldegrave, being the owner or lessee of all the collieries within the parish of Radstock, except one very small piece, and raising and selling the coal therefrom under the style of "*The Radstock Coal Company*," the defendants began to sell coal under the same title; after which the plaintiff changed her style to "*The Countess Waldegrave's Radstock Collieries*," and the defendants adopted the style of "*The Radstock Colliery Proprietors*," and, upon remonstrance, of "*The Radstock Coal Company Colliery Proprietors*," in newspapers and on their office blind, although they were never entitled to raise coal within the parish of Radstock, nor, until after the commencement of the action, within any part of the district through which the seams of Radstock coal extended.

Action by the Countess and her trustees for an injunction to restrain the defendants from infringing their rights.

Held, (1.) that the defendants were not entitled to call themselves "*The Radstock Colliery Proprietors*," since that was calculated to attract to them custom intended for the plaintiff as practically the only colliery proprietor in the parish, as well as the largest proprietor in the district; (2.) that the defendants were not entitled to style themselves proprietors

of collieries at Radstock, since that designation also pointed to the parish, and, therefore, to the plaintiff's works; (3.) that the course of conduct adopted by the defendants was calculated to deceive, and that proof of actual damage having been sustained by the plaintiff was, therefore, not requisite; (4.) that an injunction must, therefore, be granted to restrain the defendants from using either of the above appellations; (5.) but that this injunction should not extend to prevent the defendants from adopting those appellations if they should at any time become owners or lessees of collieries within Radstock parish.[1]

600. In re Lisner.

February 14, 1878. *U. S. Patent Office: Doolittle, Act. Comm.* — 13 *U. S. Pat. Gaz.* 455.

On an application for the registration of a trade-mark in respect of "fancy goods:"

Held, that although a trade-mark might be registered on a single application for an entire class of merchandise, it could not be so registered for the numerous classes of goods included in the term "fancy goods," and that registration must, therefore, be refused until the particular class of goods in respect of which the application was made was more clearly specified.

601. In re Paton [T. M. A. 1875].

March 1, 1878. *Jessel, M. R.* — 1 *Trade-Marks*, 285.

An application for the registration of the word "*Alloa*" as the applicants' trade-mark for woollen yarns being opposed, —

On motion for a direction as to the manner in which the case should be heard:

Held, (1.) that the case should be heard on summons taken out by the opponents and adjourned into court; (2.) that a delivery at the Trade-Marks Registry Office by the opponents' solicitors of a copy of the notice of the opposition motion, to-

[1] See *Newman* v. *Alvord*, 282.

gether with a copy of the indorsement of acceptance by the applicants' solicitors, was a sufficient compliance with the requirement in the Instructions to Applicants for Registration (paragraph 37), for notice of the opposition motion having been brought before the court to be given to the Registrar of Trade-Marks, by the delivery at the office by the opponents' solicitors of a copy of the notice of motion, with an indorsement of service on the applicants, signed by the opponents' solicitors, and that the personal service on the applicants and the indorsement might be dispensed with.

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602. Fullwood *v.* Fullwood. (2.)

March 5, 1878. *Chanc. Div.: Fry, J.* — 9 *Ch. D.* 176; 47 *L. J. Ch.* 459; 38 *L. T. N. S.* 380; 26 *W. R.* 435.

THE plaintiff carrying on at Somerset Place, Hoxton, the business of an annatto manufacturer, established by his father in 1785, under the name of "*R. J. Fullwood & Co.*," the defendants, one of whom had formerly been the plaintiff's partner, but had sold his interest to the plaintiff, began to carry on the same business under the name of "*E. Fullwood & Co.*," and to put out advertisements, in which they described themselves as "*late of Somerset Place, Hoxton, Original Manufacturers of Liquid and Cake Annatto*," and their business as having been "*Established in 1785.*"

Action by the plaintiff for an injunction to restrain the defendants from representing their business to be identical with or similar to his own.

Held, (1.) that the defendants had acted in a way intended and calculated to produce deception; (2.) that the fact, if it were established, that the plaintiff had delayed till November, 1876, to commence his action, he having been aware of the defendants' conduct early in 1875, was no defence, the period fixed by the statute of limitations not having elapsed; (3.) and that the injunction must be granted.

"The right asserted by the plaintiff in this action is a legal right. He is in effect asserting that the defendants are liable to an action

for deceit. It is clear that such an action is subject to the statute of limitations, and it is also clear that the injunction is sought merely in aid of the plaintiff's legal right. In such a case the injunction is, in my opinion, a matter of course if the legal right be proved to exist. In saying that, I do not shut my eyes to the possible existence in other cases of a purely equitable defence, such as acquiescence or acknowledgment, and the various other equitable defences which may be imagined. But mere lapse of time, unaccompanied by anything else, and to that I confine my observations, has, in my judgment, just as much effect and no more in barring a suit for an injunction as it has in barring an action for deceit."[1]

603. Frese *v.* Bachof. (2.)

March 22, 1878. *U. S. C. C. S. Dt. of N. Y.: Wheeler, J.*— 13 *U. S. Pat. Gaz.* 635.

THE plaintiffs being a firm of tea-merchants, who sold "*Hamburg Tea*" in a peculiar form of package, the tea being enclosed in long cylindrical parcels with pink wrappers, and with crimson papers of directions and yellow ones of warning tied in, and having a white label with the firm name within a circle pasted across the ends of the string, and another white label with the same and the words "*Hamburg Hopfensack*, 6" embossed thereon, pasted on the package, the defendant at first put up his tea in a precisely similar manner, with the firm name and address, but after the commencement of the suit discontinued the use of the firm name and address, and substituted his own.

Injunction granted to restrain the defendant from using packages similar to those of the plaintiffs, and an account ordered.[2]

604. Hagg *v.* Darley.

March 25, 1878. *Bacon, V. C.* — 47 *L. J. Ch.* 567; 38 *L. T. N. S.* 312.

THE plaintiff purchased from the "*Government Sanitary Company*," composed of the defendant and three others, the

[1] See *McLean* v. *Fleming*, 580; *Cons. Fruit Jar Co.* v. *Thomas*, 668.

[2] See *Williams* v. *Johnson*, 150.

good-will of their business of manufacturing certain fluids and soaps known as the "*Government Carbolic Disinfectants*" (on which occasion the defendant and his partners covenanted with the plaintiff not to manufacture or sell disinfectants for fourteen years, nor for the same time to disclose the secrets of the manufactures in question), and carried on the business of the company under the old name with the defendant as his manager.

Action by the plaintiff, alleging that the defendant had left his employ and set up in business as the "*Old Government Sanitary Company*," and was committing other breaches of the covenant by communicating the secret to his workmen, etc., and claiming an injunction to restrain the defendant from using the name, carrying on the manufacture of disinfectants, communicating the secret, etc.

Demurrer by the defendant overruled, on the ground, that (1.) the defendant had both pleaded and demurred without the leave of the court, under Order XXVIII. Rule 5; (2.) the covenant was not too wide or unreasonable.

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605. Steuart *v.* Gladstone.

March 25, 1878; March 4, 1879. *Chanc. Div.: Fry, J.* — 10 *Ch. D.* 646; 47 *L. J. Ch.* 423; 38 *L. T. N. S.* 557; 26 *W. R.* 657. *Ct. of App.: Jessel, M. R.; James and Bramwell, L. JJ.* — 10 *Ch. D.* 626; 40 *L. T. N. S.* 145; 27 *W. R.* 512.

PARTNERSHIP action.

The plaintiff had been expelled from the defendants' firm of commission merchants, in which he had been a partner, and which was carried on under articles, one of which provided that a retiring partner should receive the share in the partnership property to which he was entitled upon the basis of annual accounts taken, under another article, of the partnership "estate and effects," provision being thereby made for a fair valuation and appraisement of all the particulars included in such accounts, which might be in their nature susceptible of valuation, but no mention being made of the good-will of the business.

Held, on appeal, that the share of partners in the good-will of a commission business not being ordinarily estimated in calculating their annual share of profits, and it not having been so in the present case, the good-will could not be taken into account and valued as being included in the partnership "estate and effects."

606. Saxby *v.* Easterbrook.

March 25, 1878. *C. P. Div.* — 3 *C. P. D.* 339; 27 *W. R.* 188.

ACTION for damages, and an injunction to restrain the publication of statements with regard to certain patents, the property of the plaintiff, which statements were found by the jury to be libellous.

Held, that the question of libel or no libel having been decided by the verdict of the jury, the injunction must be granted.

Per Lindley, J. "The principle upon which the courts of equity have acted in declining to restrain the publication of matter alleged to be libellous is, that the question of libel or no libel is preëminently for a jury. But, when a jury have found the matter complained of to be libellous, and that it affects property, I see no principle by which the court ought to be precluded from saying that the repetition of the libel shall be restrained."

607. Ward *v.* Drat.

April 3, 1878. *Chanc. Div.: Fry, J.* — *L. J. Notes of Cas.* 1878, *p.* 67.

MOTION for an injunction to restrain the defendant from sending libellous demands for payment of rent having been refused by Malins, V. C., who reserved the costs:

Held, that the court had no authority to grant an injunction in such a case, either original, or under the Judicature Act, 1873, § 25, sub-s. 8.

608. Rose *v.* Loftus.

April 10, 1878. *Malins, V. C.* — 47 *L. J. Ch.* 576; 38 *L. T. N. S.* 409.

THE plaintiff being a manufacturer of lime juice, which he sold in bottles moulded specially for him with a spray of lime-tree leaf and blossom and his name "*Rose & Co.*," and who further placed on these bottles a label containing the same spray and name, the defendant, who manufactured a similar article, on one occasion, at the request of a customer, filled some of the plaintiff's bottles brought to him by the customer with his own article, but washed the plaintiff's labels from the bottles and replaced them with his own, and also gave the customer a large printed card with the words "*Loftus' Lime Juice Cordial*," for public exhibition.

Action by the plaintiff for an injunction to restrain the defendant from infringing his rights.

Held, (1.) that the defendant had acted wrongfully, notwithstanding that he had placed his own labels on the bottles, since they still bore the plaintiff's name and mark; (2.) but that he had not acted with any fraudulent intention, and that charges of fraud made by the plaintiff in his statement of claim were not established; (3.) and, therefore, that on the defendant undertaking not to repeat the act the injunction should not be granted, nor any costs or account of profits.[1]

609. Eno *v.* Stephens.

April 11, May 29, 1878. *Bacon, V. C.* — 1 *Trade-Marks*, 324. *Ct. of App: Jessel, M. R.; James and Bramwell, L. JJ.* — 1 *Trade-Marks*, 325.

THE plaintiff being the proprietor of "*Eno's Fruit Salt*," who had for some time used, and had registered under the T. M. A. 1875 certain labels containing, with other words and devices, those words, and the words "*Fruit Salt*," "*Fruit Saline*," or "*Fruit Powder*," without the name, the defendant sold certain preparations under the names of "*Fruit*

[1] See *Millington* v. *Fox*, 63.

Saline," "*Stephens & Co.'s Effervescing Vinous Fruit Salts*," and "*Stephens' Vinous Salts.*"

Injunction granted to restrain the defendant from using the words "*Fruit Salt*," "*Fruit Saline*," or "*Fruit Powder*," or any such combination of words.

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610. In re Leonardt [T. M. A. 1875].

April 12, 1878. *Jessel, M. R.* — 1 *Trade-Marks*, 316.

A STEEL-PEN manufacturer procured the registration, as parts of his trade-marks on pens, of certain words and devices, consisting respectively of the royal arms, the words "*Penna Vittorio Emmanuele*" with a portrait, the word "*Garibaldi*" with a portrait, the word "*Masonic*" with the Masonic arms, and the words "*Selected*," "*Improved*," "*Superior*," "*Office*," "*Commercial*," and "*International*," those words and devices having been in common use by more than three firms of steel-pen makers for some years.

On motion by certain firms of steel-pen manufacturers, and with the consent of the registered proprietor:

Held, that there must be added to the registration of the marks in question a note containing a disclaimer of an exclusive right in the particulars specified.

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611. In re Mitchell [T. M. A. 1875]. (2.)

April 12, 1878. *Jessel, M. R.* — *W. N.* 1878, *p.* 101; 1 *Trade-Marks*, 317.

THE words "*Selected Pens, London*," together with the arms of the city of London, were registered by a steel-pen manufacturer as his trade-mark on steel-pens, the word "*Selected*" having been in common use by more than three firms of steel-pen makers.

On motion by certain firms of steel-pen manufacturers:

Held, that on evidence of the consent of the registered proprietor being produced, a note must be added to the registra-

tion of the mark in question, to the effect that the word "*Selected*" in the above-mentioned mark was common to the pen trade.

612. In re Rader & Co.

April 16, 1878. *U. S. Patent Office: Spear, Comm.* — 13 *U. S. Pat. Gaz.* 596.

APPLICATION for the registration of the words "*Iron Stone*," enclosed in an oval border (other words descriptive of the article and place of sale or manufacture being also included within the border), as a trade-mark on water-pipes, refused, on the ground that the words were in themselves merely descriptive of the substance of the pipes, and that the oval border in which they were enclosed did not give the requisite distinctiveness; and, further, that the oval border was not associated with the words in question only.

613. Duwel *v.* Bohmer.

April, 1878. *U. S. C. C. S. Dt. of Ohio: Swing, J.* — 14 *U. S. Pat. Gaz.* 270.

SUIT by a citizen of the State of Ohio for an injunction to restrain an infringement of his trade-mark, registered in pursuance of the statutes of the United States, by another citizen of Ohio.

Demurrer, on the ground that the U. S. Circuit Court had no jurisdiction in such a suit between citizens of the same state, overruled; and *Held*, that the U. S. Circuit Courts had jurisdiction in trade-mark cases between citizens of the same state concurrent with that of the state courts.[1]

[1] This decision has been rendered obsolete by that of the Supreme Court of the United States in *United States v. Steffens*, declaring the acts of Congress concerning trade-marks unconstitutional.

614. Rolt *v.* Bulmer.

May 13, 1878. *Jessel, M. R. — W. N.* 1878, *p.* 119.

ACTION for a dissolution of partnership and accounts, the partnership having been carried on under articles which provided for an account being taken, at the determination of the partnership, of the partnership "moneys, stock in trade, debts, effects, and things," but did not directly refer to the good-will of the business.

Held, that the good-will must be taken into account, as being included in the "effects and things."

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615. Reynolds *v.* Bullock.

May 13, 1878. *Hall, V. C.* — 47 *L. J. Ch.* 773; 39 *L. T. N. S.* 443; 26 *W. R.* 678.

ACTION for a partnership account commenced by one of two members of a partnership firm, on the expiration of the partnership term, the partnership having been carried on under articles which provided for the valuation of the partnership "property and effects" on the dissolution, but contained no reference to the good-will of the business.

Held, that there being no direct negative stipulation in the articles, the good-will must be taken into account and valued, as being included in the "property and effects."

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616. In re Jelley, Son & Jones [T. M. A. 1875].

May 18, 1878. *Jessel, M. R.* — 1 *Trade-Marks*, 346.

APPLICATION having been made for the registration of a device, consisting of a pointer eating out of a porridge-pot (which the applicants had long used on a variety of metal goods contained in class 13, but not on other goods), as an old trade-mark for class 13, and as a new trade-mark for other classes, in particular for class 12, containing cutlery and edge-tools, and for fencing wire, being one of the kinds of goods included in class 5; the application was opposed by the pro-

prietor of another trade-mark, consisting of a device of a pointer dog standing at a point, with the word "*Staunch*," and registered for all the goods contained in classes 5, 12, and 13, on the ground that the applicants' device so nearly resembled his as to be calculated to deceive.

On summons adjourned into court:

Held, (1.) that with respect to old marks the rule of the court was to permit registration of even identical old marks, up to the number of three, though if more than three applications for the registration of the same old mark were received it must be treated as common; and that, with regard to class 13, the mark being a *bonâ fide* old mark, must be admitted to registration; (2.) that with respect to new marks, it was the duty of a person about to adopt one to make it as distinct as possible, and that the fact that a man had been in the habit of using a certain trade-mark on one class of goods did not entitle him to begin to use it on another class if it would interfere with another person's mark, and, therefore, with respect to class 12, that inasmuch as the applicants' mark so nearly resembled the opponent's as to be calculated to deceive, especially when they were compared as stamped on the metal, registration in class 12 must be refused; (3.) that, with respect to class 5, the mark might be registered in that class for fencing-wire only, as that would not interfere with the opponent's trade; (4.) that no order could be made as to costs.

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617. Guinness *v.* Heap.

May 30, 1878. *Malins, V. C.*

THE plaintiff being a brewer of stout, who used a trade-mark on his bottles containing the words "*Guinness' Extra Stout*," with a harp, the defendant sold other beer in bottles bearing labels of the same shape as those used by the plaintiff, but which had the words "*Genuine Extra Stout*," substituted for the words "*Guinness' Extra Stout*" in the plaintiff's

mark, and also contained a device in imitation of the harp used by the plaintiff.

Injunction granted to restrain the defendant from infringing the plaintiff's rights, notwithstanding that the defendant had altered the device, discontinued the use of the labels, and offered to undertake not to use any more of them.

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618. The London and County Banking Co. *v.* The Hampshire and North Wilts Bank.

June 7, 1878. *Jessel, M. R.*

MOTION by the plaintiff company, under § 20 of the Companies Act, 1862, for an injunction to restrain the defendants from changing their name to "*The Capital and Counties Bank*" refused, on the ground that the adoption of the latter name by the defendants was not calculated to deceive persons who used ordinary care in the conduct of their business transactions.

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619. The Merchant Banking Company of London (Limited) *v.* The Merchants' Joint Stock Bank.

June 29, 1878. *Jessel, M. R.* — 9 *Ch. D.* 560; 47 *L. J. Ch.* 828; 26 *W. R.* 847.

ON motion by the plaintiff company for an injunction to restrain the defendant company from using its name recently assumed and registered, as being too similar to the name of the plaintiff company, or any other too similar name:

Held, (1.) that inasmuch as § 20 of the Companies Act, 1862, only affected the question of registration of the name of a company, the rights of companies after registration were not varied by that enactment; (2.) that the similarity between the names was not sufficient to show an intention or probability of deception; (3.) and that the motion must, therefore, be refused.

620. Ex parte Sales Pollard & Co. [T. M. A. 1875].

July 8, 1878. *Jessel, M. R.*

On motion by the registered proprietors of a trade-mark on snuff, consisting of the letters "*S. P.*" (the initials of the firm), which they had discovered, subsequently to registration, to have been in common use for many years in the snuff trade, though used originally by themselves :

Leave given to rectify the register by striking out the mark in question.

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621. In re Rosing [T. M A. 1875].

July 11, November 13, 1878. *Bacon, V. C.* — 1 *Trade-Marks*, 371. *Ct. of App.: Jessel, M. R.; Baggallay and Thesiger, L. JJ.*

Application having been made for the registration of the applicant's family arms, consisting of a sprig of two roses and a twisted horn, as his trade-mark for several classes of goods, and among others for classes 5, 12, and 13, containing cutlery and other metal goods, the Cutlers' Company of Sheffield opposed the application as to classes 5, 12, and 13, on the ground that the mark in question so nearly resembled a Sheffield corporate mark many years previously assigned to another manufacturer of cutlery, and still used by him, as to be calculated to deceive, the latter mark consisting of a plain horn suspended by a looped cord.

On motion by the applicant for a direction to the registrar to register the mark in the classes in question :

Held, by the V. C.: (1.) that the two marks were not sufficiently similar for deception to be anticipated, and that the applicant's mark must, therefore, be registered ; (2.) that the Cutlers' Company must pay the costs, notwithstanding that they had intended to act in the public interest.

Held, by the Court of Appeal: (1.) that the two marks were too similar, especially when looked at as stamped on the metal, for the applicant's mark to be admitted to registration in classes 12 and 13 (as to class 5 the Cutlers' Company aban-

doned their opposition); (2.) that the applicant must pay the costs of the appeal, but that no costs of the motion in the court below could be given, the applicant having succeeded as to class 5.

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622. In re Brook [T. M. A. 1875–6–7].

July 13, 1878. *Hall, V. C.* — 26 *W. R.* 791.

AN application having been made for the registration of a considerable number of trade-marks in respect of cotton goods, the Committee of Experts at Manchester placed half of the marks in the first class, as being entitled to registration, and the other half in the second class as not being so entitled; and the Registrar of Trade-Marks refused registration to the marks so placed in the second class, and further divided the marks placed in the first class, admitting six of them to separate registration, but offering only representative registration to the remainder, on the ground that the essential feature in all of them was a device consisting of a goat's head crest, and the name "*Brook's*." On motion by the applicants for the separate registration of the whole of the marks: *Held*, (1.) that as to the marks placed by the committee in the second class, the case was governed by *In re Orr Ewing & Co.*, and that the court was debarred from reconsidering the decision of the committee; (2.) that as to the marks placed in the first class, but offered only representative registration, the case was governed by *In re Barrows*, and that separate registration must be refused; but that the goat's head crest and the name "*Brook's*" should each be registered separately, as a representative mark, with the additional words to mark its representative character appended to each.

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623. In re Lysaght [T. M. A. 1875].

July 19, 1878. *Jessel, M. R.*

A TRADE-MARK having been registered in respect of the goods contained in class 5, on motion by the registered proprie-

tor, order made to rectify the register by limiting the registration to galvanized sheet iron, on which alone it was his old mark.

624. Ex parte Walker & Co.

July 25, 1878. *Malins, V. C.*

On motion by the registered proprietors of a trade-mark on iron, consisting of the letter W., a crown, and the word "*Netherton*," leave given to rectify the register by substituting the word "*Dudley*" for the word "*Netherton*," the address being held not to be an essential particular of the trade-mark in question.

625. In re Saunion & Co. [T. M. A. 1875].

August 2, 1878. *Jessel, M. R.*

The Anglo-Portuguese Oyster Fisheries Company having been for some years in the habit of importing oysters dredged in Portuguese waters into England, and selling them there, either without previous fattening, or after fattening at beds at Queenborough, and Saunion & Co. having acted as the agents for the company in this undertaking, under an agreement which amounted in law to an agreement for a partnership terminable at the will of the company, the partnership was dissolved, and the connection terminated by the company, who then carried on business through a new agent. Saunion & Co. afterwards applied for the registration of a trade-mark consisting of a device containing, among other particulars, the words "*Anglo-Portugo Oysters*," those words being the words by which the company had designated their oysters, and they claimed to use this mark upon any oysters which they considered to be of the same breed as the company's, whether brought from Portugal or not.

On motion by the company:

Held, that the inclusion of the words "*Anglo-Portugo*" in the applicants' trade-mark was either deceptive, if the oysters did not come from Portugal, or descriptive, if they did, or if

the words denoted a particular breed, and not the country of origin, and that the words must be struck out of the trade-mark which it was proposed to register.[1]

626. In re Brandreth [T. M. A. 1875].

August 8, 1878. *Jessel, M. R.* — 9 *Ch. D.* 618; 47 *L. J. Ch.* 816; 27 *W. R.* 281.

On application, by way of adjourned summons, for the registration of the word "*Porous*" as a trade-mark in respect of "*Allcock's Porous Plasters*," and opposed:

Held, (1.) that the word "*Porous*" was descriptive, and, therefore, incapable of registration; (2.) that in any case it could only be registered as included in the phrase "*Allcock's Porous Plasters*," which phrase was itself descriptive; (3.) that the application must be refused with costs; (4.) that the only costs which, under Order LV., could be given were the costs of the proceedings subsequent to security for costs being given by the opponents, that being the time when, by Rule 16 of the Trade-Marks Rules, the case stood for the determination of the court, and that the costs of the previous proceedings in the Trade-Marks Registry Office could not be given.

627. The Hoosier Drill Co. *v.* Ingels.

1878. *U. S. Patent Office: Doolittle, Act. Comm.* — 14 *U. S. Pat. Gaz.* 785.

A TRADE-MARK having been registered in the name of Ingels at a time when another application by the company for the same trade-mark was pending, and an interference having been declared between the parties, the Commissioner of Patents held that only the question of priority of adoption could be inquired into on an interference, and not questions of disputed ownership. On motion by the company to rehear: *Held*, (1.) that neither prior invention, use, or adoption was necessary to entitle to the registration of a trade-mark under

[1] See *Newman* v. *Alvord*, 282.

the U. S. Statute, a simple intention to use being sufficient; and (2.) that in investigating the title to a trade-mark, all matters relating to the ownership should be gone into, and not only the question of priority of adoption, and that the motion must be granted.

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628. The Manhattan Medicine Co. *v.* Wood.

September 21, 1878. *U. S. C. C. Dt. of Me.: Clifford, J.*—14 *U. S. Pat. Gaz.* 519.

THE plaintiffs manufactured a medicine called "*Atwood's Vegetable Physical Jaundice Bitters*" (which they sold in peculiar shaped bottles, having the words "*Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass.*," blown in the glass, and bearing a yellow label), in succession to the firm of Carter & Dodge, who had purchased from the original inventor and proprietor the right to manufacture and sell the medicine and use the trade-mark used by him, but not in Maine and some other excepted places. The defendant in 1861 purchased from the son of the original proprietor the genuine secret recipe for the medicine, to be used in Maine, and from that time till the commencement of the suit he continued to manufacture and sell the medicine and use the trade-mark without interference, though it did not appear that the son had sold by his father's authority. Suit for an injunction and an account.

Held, (1.) that the plaintiffs had no exclusive right to sell the medicine or use the trade-mark; (2.) that neither they nor their predecessors in title had ever had any right to do so in Maine; (3.) that the rights possessed by some of the assignors to the plaintiffs had been lost by reason of their having used the genuine trade-marks on spurious medicines of inferior quality; (4.) that the plaintiffs were, further, disentitled by their delay; (5.) that the plaintiffs' assignors had lost whatever right they had in the trade-mark by not confining themselves to the districts to which alone the grants from the original proprietor extended; (6.) that the trade-mark

used by the original proprietor had been abandoned by those claiming under him, when they adopted new bottles and labels in place of those used by him ; (7.) that the article not being patented, and the defendant being in possession of the genuine recipe, and the plaintiffs having no exclusive right, and none at all in Maine, the defendant could not be restrained from using the trade-mark, and that the injunction must be refused with costs.[1]

629. Leidersdorf *v.* Flint.

1878. *U. S. C. C. E. Dt. of Wisc.: Harlan and Dyer, JJ.* — 13 *Am. L. Rev.* 390.

THE plaintiffs and defendant being alike citizens of Wisconsin, the defendant used upon his packages of tobacco a trade-mark which the plaintiffs alleged to be an infringement of that used by them on theirs.

Suit for an injunction to restrain the defendant from infringing the plaintiffs' rights, brought under the U. S. Revised Statutes, section 4942 (Act of 1870, section 79).

On demurrer:

Held, that, inasmuch as Congress was only authorized by the Constitution of the United States to " secure for limited times to authors and inventors the exclusive right to their respective writings and discoveries," and the right to a trade-mark did not depend upon invention or originality but upon prior user, legislation by Congress upon the subject of trade-marks was *ultra vires ;* and therefore that, although if trade-marks had been within the legislative power of Congress, the federal court would have had jurisdiction, under the authority conferred on it by statute, even between citizens of the same state, that not being so, the demurrer must be sustained on the ground of want of jurisdiction.[2]

[1] See *Seabury* v. *Grosvenor*, 562; *McLean* v. *Fleming*, 272.

[2] See *United States* v. *Steffens*, 660.

630. Ex parte Lawrence & Co. [T. M. A. 1875].

November 2, 1878. *Jessel, M. R.*

LAWRENCE & CO., carrying on business as manufacturers of printers' rollers and of the composition used for coating the same, and having since 1872 used a trade-mark thereon consisting of a device of a printer's roller, with the words "*The Durable*" in an oval, their manager, Marler, during the absence abroad of the members of the firm, and without their knowledge, obtained the registration of a mark substantially the same as theirs in his own name, describing himself as a manufacturer of the same articles as his employers, and of their address.

On motion by Lawrence & Co. for rectification of the register, either by the insertion of their firm name in the existing entry in place of that of Marler, or by that entry being expunged, with liberty for them to proceed to advertise their mark, with a view to registration, *de novo :*

Held, (1.) that relief in the first alternative could not be granted, since the registration of Marler, having been effected without instructions from the applicants, was not a registration on their behalf, or one of which Marler could be treated as a trustee for them, but a wrongful act from the beginning, of which, if the applicants wished to take the benefit, they must at the same time take the inconveniences, so that the applicants could only utilize the existing entry by obtaining an assignment from Marler; but that this was impossible, since he had never carried on any business, and, therefore, could not assign the mark, being unable to assign with it the good-will of the business in which it was used; (2.) that the proper method of rectifying the register was by expunging the improper entry altogether, and that relief must, therefore, be granted in the second alternative.

631. Day *v.* Brownrigg.

November 6, December 4, 1878. *Malins, V. C.* — 39 *L. T. N. S.* 226. *Ct. of App.: Jessel, M. R.; James and Thesiger, L. JJ.* — 10 *Ch. D.* 294; 39 *L. T. N. S.* 553; 27 *W. R.* 217.

THE plaintiffs being the owners of a house and estate at Ashford, Middlesex, known as "*Ashford Lodge*" and "*The Ashford Lodge Estate*," the defendant acquired another house in the same neighborhood, known as "*The Villa, Ashford*," or "*Ashford Villa*," and changed the name to "*Ashford Lodge*."

Action for an injunction to restrain the defendant from using that name to the injury of the plaintiffs' property.

On demurrer:

Held, by the Ct. of App.: (1.) that the plaintiffs could not acquire an exclusive right in the name of a house apart from trade, and that the demurrer must be allowed; (2.) that no extended power of granting injunctions was conferred upon the court by the Judicature Act of 1873, s. 25, sub-s. 8.

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632. Ex parte Ede Bros. & Co. [T. M. A. 1875–6–7].

November 8, 1878. *Jessel, M. R.*

APPLICATION having been made for the registration of certain trade-marks for goods included in the cotton classes, such trade-marks were placed by the Manchester Committee of Experts in the first class of marks submitted to them, as being marks qualified for registration. On subsequent application by other firms for the registration in their names of trade-marks substantially identical with those so classed, the committee placed the marks in respect of which such later application was made in their second class, on the ground that the later applicants had no title to the marks which they sought to register.

On motion by the later applicants:

Held, that the function of the Committee of Experts was to decide whether a trade-mark offered for registration contained the particulars necessary to constitute a registrable

trade-mark, and not to decide questions of title between rival claimants; that in the cases in question the committee had acted on a mistaken view of their functions; and that, notwithstanding the classification by the committee, the registrar must proceed to advertise the marks with a view to registration, leaving the question of title to be decided in the future, on any opposition which the prior claimants might offer to the registration of the marks, after due advertisement.

633. Braham *v.* Beachim. (2.)

November 14, 1878. *Chanc. Div.: Fry, J.*

After the decision in *Braham* v. *Beachim* (1), the defendants in that case acquired a colliery, but not in the parish of Radstock, and carried on business as "*The Radstock Coal and Wagon Co., Colliery Proprietors, Radstock, Somerset.*"

Motion by the plaintiffs to commit the defendants for breach of the injunction refused, on the ground that the term used by the defendants did not imply more than that they were proprietors of collieries, whose place of business was at Radstock, which they were entitled to state, and that no breach of the injunction had been committed.[1]

634. In re Thomas.

November 18, 1878. *U. S. Patent Office: Doolittle, Act. Comm.*—14 *U. S. Pat. Gaz.* 821.

On an application for the registration as a trade-mark of a certain device, to be used in conjunction with other words and symbols, among which were certain of the words and symbols used in Freemasonry:

Held, that the fact that such words and symbols were used in Freemasonry did not disentitle a manufacturer to use them in his trade, by reason of probability of deception of the public or otherwise, and that the application must be granted.

[1] See *Newman* v. *Alvord*, 282.

635. The Singer Manufacturing Co. *v.* Loog.

November 21, 1878. *Bacon, V. C.*

DURING the pendency of an action by the plaintiffs for an injunction to restrain the English agent of German manufacturers from infringing the trade-mark on the plaintiffs' sewing machines, the publisher of a newspaper called *The Sewing Machine Gazette* published a paragraph in which it was stated that the action was pending, that during its pendency unprincipled traders had issued unfair and illegal advertisements, and that, after the conclusion of the existing action, further proceedings would be taken.

Motion by the defendant to commit the publisher of the newspaper for contempt of court refused, on the ground that the paragraph in question was not calculated to prejudice the fair trial of the action.

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636. Moses *v.* Sargood, Ewen & Co.

November 22, 1878. *Hall, V. C.*

THE plaintiffs being merchants and manufacturers of ready-made clothing, who placed on their goods a trade-mark registered in England and the colonies, consisting of one or more royal crowns, up to the number of six, the number varying according to the quality of the goods, from which mark the goods had acquired the name of "*Crown Clothing*," the defendants, who alleged that they had long exported to the colonies quantities of material for clothing not made up bearing a trade-mark consisting of an imperial crown between two standards, began to export ready-made clothing ticketed with that mark.

On motion by the plaintiffs injunction granted to restrain the defendants from selling or shipping ready-made clothing bearing the mark in question, or any other mark infringing the plaintiffs' rights, on the ground that, although the mark might not deceive if placed side by side with the plaintiffs' mark, it was calculated to obtain for the defendants' goods

the same name as that by which the plaintiffs' were known, and to deceive an ordinary purchaser who had not an opportunity of comparing the marks.

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637. In re Kuhn & Co. [T. M. A. 1875].

November 29, 1878. *Jessel, M. R.*

KUHN & CO. having obtained registration as their trade-mark of a mark to be placed on steel pens for the German market, containing a description of the pens in German, with a figure of a steel pen:

On motion by other manufacturers of steel pens:

Held, (1.) that the figure of a steel pen was common to the trade, and could not be exclusively appropriated, and that a note must be appended to the registration to the effect that that figure was not claimed *per se*, but only in combination; (2.) that Kuhn & Co. must pay the costs of the proceedings, notwithstanding that the applicants had not given them previous notice of their intention to take action in the matter, but that no costs would have been given if it had been further proved that the mark had only become common by Kuhn & Co.'s mark being copied by English firms without their permission, and that their entire mark had been registered for a year and a half before any objection was made to it.

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638. Weldon *v.* Dicks.

December 3, 1878. *Malins, V. C.* — 10 *Ch. D.* 247; 39 *L. T. N. S.* 467.

THE plaintiff being the proprietor of the copyright in a novel entitled "*Trial and Triumph*," first published in 1854, and republished in 1860, and since then long out of print, the defendant in 1875 published a tale under the same name in *Bow Bells*, and republished it in a volume, with other tales, at the end of the same year, and again, in a separate form, in 1877.

Action for an injunction to restrain the defendant from infringing the plaintiff's copyright in the title.

Held, (1.) that the title of the plaintiff's book was included in the copyright, by which the book was protected; (2.) that the fact that the plaintiff's book had been long out of print did not deprive him of the right to protection against infringers; (3.) that the plaintiff was not disentitled by reason of delay, he having commenced his action within two months after he first became aware of the assumption of the title by the defendant; (4.) that the injunction must be granted.

"There can only be acquiescence where there is knowledge. This court never binds parties by acquiescence where there is no knowledge, though it is true that knowledge and acquiescence is in many cases fatal to parties."

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639. Levy *v.* Walker.

December 21, 1878; February 5, 1879. *Hall, V. C.* — 39 *L. T. N. S.* 654. *Ct. of App.: Jessel, M. R.; James and Bramwell, L. JJ.* — 10 *Ch. D.* 436; 48 *L. J. Ch.* 273; 39 *L. T. N. S.* 656.

THE plaintiff, Mrs. Levy, having (while Miss Charbonnel) carried on business in partnership with the defendant as confectioners, under the name of "*Charbonnel and Walker*," on the dissolution of the partnership and sale of the business under the direction of the court, the defendant purchased the entirety of the partnership business, leasehold premises, stock in trade, good-will, etc., and continued to carry on the business under the old firm name.

On motion by the plaintiffs (Mrs. Levy and her husband) for an injunction to restrain the defendant from using the old firm name, and from representing that the plaintiffs or either of them were or was in partnership with her:

Held, on appeal, that the plaintiffs were not entitled to an injunction, on the ground that neither of them could be subjected to any liability by the use of the name by the defendant; and (*per* James, L. J.), that, in any case, the sale of the business and good-will carried with it the right to use the old firm name.

Per James, L. J. "The sole right to restrain anybody from using

any name that he likes in the course of any business he chooses to carry on is a right in the nature of a trade-mark. That is to say, somebody has a right to say 'You must not use a name, whether fictitious or real, or a description, whether true or not, which is intended to represent, or is calculated to represent, to the world that your business is my business, and therefore deprive me by a fraudulent misstatement of yours of the profits of the business which would otherwise come to me.' That is the sole principle on which the court interferes. The court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything.

"I hold that the sale of the good-will and business did convey the right to the use of the partnership name as a description of the articles sold in that trade, and that that right is an exclusive right as against the person who sold it, and as against all the world, if any person in that world were representing himself as carrying on the same business."

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640. The Army and Navy Coöperative Society (Limited) *v.* The Junior Army and Navy Stores (Limited).

January 17, 1879. *Jessel, M. R.*

MOTION by the plaintiffs for an injunction to restrain the defendants from using in their business their name (as above), or any other name calculated to deceive, refused, on the ground that the word "*Junior*" prefixed to the defendants' title was quite sufficient to prevent deception; and that in any case there could be no mistake, since the only persons admitted to deal with either establishment were shareholders, or persons introduced through shareholders, who would not be deceived.

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641. In re Whiteley [T. M. A. 1875].

February 8, 1879. *Jessel, M. R.*

AN application having been made by Whiteley, a universal provider, for the registration of a trade-mark, consisting prin-

cipally of two globes, for goods comprised in numerous classes, including classes 11, 12, and 13 (surgical instruments, cutlery, metal implements, etc.), which trade-mark he had used for some years on wrappers, labels, bill-heads, etc., and on metal plates affixed to some of the articles, the application was opposed as to classes 11, 12, and 13 by a firm of cutlers, who had for many years stamped a single globe on their cutlery and metal goods, and had obtained registration of that mark on goods included in the classes in question.

On adjourned summons:

Held, that registration of the applicant's mark should be granted in the classes in question, he giving an undertaking (of which a note was to be entered on the register) not to stamp or impress the mark on any part of the metal of any article in classes 11, 12, or 13, but to affix it to, or use it in connection with, articles in those classes, in the manner in which it had previously been affixed or used.

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642. In re Farina [T. M. A. 1875]. (2.)

February 13, 1879. *Hall, V. C.* — 27 *W. R.* 456.

J. M. FARINA having long used and recently registered three trade-marks on Eau de Cologne, consisting respectively of a label with his signature, and a seal in the corner, to be applied to the side of the bottle, a circular stamp with three parallel lines running from it, to be applied to the top and neck of the bottle, and a label consisting of a picture of his house, "*Gegenüber dem Jülichs Platz*," with medals and letter-press, to be applied to the boxes containing the bottles, another maker of Eau de Cologne applied for the registration in his name of three trade-marks similarly composed, to be used in the same manner.

On motion by the registered proprietor for an injunction to restrain the second applicant from proceeding with his application:

Held, (1.) that the trade-marks were too similar to those already on the register for registration to be allowed, and that

the fact that the house on the applicant's third mark, described as "*Gegenüber dem Elogius Platz*," was said to be a correct view of his house in a street turning out of that square, did not prevent his label from being a colorable imitation of the original, having regard to the similarity in the letter-press and the position of the medals, though these last were not themselves the same as those in the label registered; (2.) that the applicant's allegation that he had used his marks for several years without interference did not entitle him to registration, since it was not proved that the original proprietor was aware of such use; (3.) that the injunction must be granted as to all three marks, notwithstanding that the German Court of Appeal, differing from the Court of First Instance, had, while prohibiting the registration in Germany of the label with the signature, permitted that of the label with the house, the question of resemblance being purely one of fact, as to which the German decisions were to be merely regarded as opposite verdicts by two special juries.

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643. In re Rabone Bros. & Co. [T. M. A. 1875.]
In re Burys & Co. (Limited).

February 15, 1879. *Jessel, M. R.*

RABONE BROS. & CO. having long used a trade-mark consisting of a lion couchant, with their trade name, upon iron bars, sheets, and hoops (included in class 5), and upon a large variety of cutlery, edge tools, and other implements (included in classes 12 and 13), applied for the registration of their trade-mark in classes 5, 12, and 13. Burys & Co. having long used a trade-mark consisting of a lion couchant, with or without their trade name or other additions, upon steel (included in class 5), and upon edge tools, files, and other goods (included in classes 12 and 13), also applied for the registration of their trade-marks in classes 5, 12, and 13. Each application was opposed by the other applicants.

On adjourned summonses:

Held, (1.) that both parties should be registered in class 5,

for the goods respectively specified only; (2.) that since Rabone Bros. & Co.'s trade had been mostly confined to the colonies, both parties should be registered in classes 12 and 13, upon an undertaking being given by Rabone Bros. & Co. not to use their mark in Europe, and an undertaking by Burys & Co. not to use theirs in Australia, Tasmania, New Zealand, the West Indies, or British Columbia, a note of each undertaking to be entered on the register; (3.) that inasmuch as Burys & Co.'s marks were cutlers' corporate marks, which had been assigned to them by one John Bedford, but had not been surrendered by him to the Cutlers' Company, or reassigned by the company to Burys & Co., without which Burys & Co.'s title was not recognized by the company, the registration of their marks must be deferred until their title was perfected.

644. Spratt's Patent *v.* Ward & Co.

February 27, 1879. *Bacon, V. C.* — 40 *L. T. N. S.* 250; 27 *W. R.* 470.

ACTION for an injunction to restrain the defendants from selling dog-biscuits under the name of "*Fibrine Dog Cakes*," or any other title intimating that their biscuits were manufactured under Spratt's patent, the property of the plaintiffs. Notice having been given by the defendants that they required the action to be tried before a judge and special jury, on adjourned summons taken out by the plaintiffs for the trial to be before the judge himself:

Held, that there being questions involved beyond a mere simple issue of fact, an order must be made on the summons, as asked.

645. In re Hargreaves [T. M. A. 1875].

February 27, 1879. *Hall, V. C.* — 27 *W. R.* 450.

ON motion for leave to register a new trade-mark consisting of an anchor with the words "*Anchor Brand*," for bacon and ham, being goods included in class 42, in which class there were already four marks registered in which an anchor

was a conspicuous feature, such four marks being used, not for bacon and ham, but for butter, dog-biscuit, preserved fish and meat, and cattle food, respectively, all of which came within class 42:

Held, that leave would not be given to register the mark in question, being a new mark for part of a class, nor at all, there being more than three similar marks already on the register.

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646. Orr Ewing & Co. *v.* Johnston & Co.

March 15, 1879. *Chanc. Div.: Fry, J.*—40 *L. T. N. S.* 307; 27 *W. R.*

THE plaintiffs being manufacturers and exporters to the Indian markets of Turkey red yarn, on which they had long placed a triangular ticket or label, in green and gold, on which a conspicuous feature was two elephants supporting a banner with an inscription, with a crown between the elephants, the defendants, who had for some years exported other goods to India, with a ticket bearing a figure of the elephant-headed Hindoo goddess Gunputty, began to export Turkey red yarn, and to place upon it a ticket of a similar shape and in similar colors to the plaintiffs' (the shape and colors being common to the trade), and having upon it two different elephants supporting a banner with an inscription, with the figure of Gunputty between the elephants in place of the crown. The plaintiffs' ticket was proved to have acquired a variety of names in India, among which was the name "*Bhe Hathi*," or "*Two Elephant*" ticket. Registration had been refused to this ticket (*In re Orr Ewing & Co.*), on the ground that elephants were common to the trade.

Action by the plaintiffs for an injunction to restrain the defendants from infringing their rights.

Held, (1.) that though it was not probable that English purchasers or Indian dealers would be deceived, it was not improbable that the ultimate purchasers in India would be, in consequence of the defendants' ticket being calculated to obtain the same name of "*Bhe Hathi*" as the plaintiffs'; (2.)

that it was not necessary to prove any fraudulent intention on the part of the defendants; (3.) that the fact that a variety of names had become attached to the plaintiffs' ticket and goods did not destroy their right to protection for the mark, where one of those names was likely to be attributed to the defendants' ticket and goods; (4.) that the two elephants, forming a material and substantial part of the plaintiffs' trade-mark, having been taken by the defendants, the burden was upon them to disprove the probability of deception, not upon the plaintiffs to prove it; (5.) that the two elephants were not established to be common to the trade, since, though a number of other tickets bearing those animals were produced, it was not shown that they had been used or known; (6.) that the rights of the plaintiffs in their mark were not affected by the refusal to register, and that the injunction must be granted.[1]

[1] The court said: "Having described the tickets, I repeat the question, Should I be deceived so as to take the one ticket for the other, even if the two tickets were not before me, supposing me to be a purchaser of ordinary caution and ordinary intelligence? I answer I should not, and for this reason, that the two tickets certainly do not impress the eye throughout as being the same. There is a great similarity, undoubtedly; but more than that, I am bound to observe in the one there is a name I can read, and in the other there is a name which I cannot read, therefore there is a very strong difference between them. I can understand from whom the one emanated, but I cannot tell from whom the other came. I can read the place of manufacture upon both, and I can see they are different; and further than that, that the plaintiffs always used this green ticket with a trade-mark, which trade-mark the defendants have not imitated, and to which trade-mark they have challenged the attention of the reader by marking it as their trade-mark. That question, therefore, I should have to answer in the negative.

"But then arises the second question, Have the defendants taken a material and substantial part of the plaintiffs' ticket? For this purpose it seems to me immaterial to consider whether the ticket is justly entitled to be called a trade-mark strictly or not, for the reasons which appear in the course of what I am about to say. Before I can answer the question as to materiality of the parts taken I must have regard to two things. In the first place, I must look at the tickets and inquire whether a large part which impresses the eye has been taken, whether a significant characteristic of the ticket has been taken; and I answer that it has. I find that the two elephants in the two top corners of the plaintiffs' triangular ticket are repeated by two elephants in the two top corners of the defendants' ticket. It is quite true that the elephants are in a different position; one set of elephants have howdahs upon them, and the others have not, and the trunks are turned in different direc-

647. In re Rotherham [T. M. A. 1875].

March, 27, 1879. *Bacon, V. C.* — 27 *W. R.* 503.

MESSRS. ROTHERHAM & SONS, of Coventry, having long manufactured watches and exported them to Messrs. Tod &

tions; but still in each corner there is an elephant that impresses the eye with a considerable amount of similarity. Then, I must next inquire the mode in which the plaintiffs' goods have been accustomed to be sold, and what people have called those goods. . . . . Another argument has been addressed to me which requires attention. It is this: It has been proved that the name 'Bhé Hathi' is not the sole name which has been used for the plaintiffs' goods in the Bombay market. His goods are known as 'Hathi' yarn, 'Bhé Hathi,' 'Asul Graham,' and various names; and it is argued that where goods bear a number of names another manufacturer may introduce a trade-mark, and may appropriate to himself one of those names, though he could not do that if the goods bore one name only. In my opinion, no such argument ought to prevail for a moment. If goods are sold in the market as A. or B. by a particular maker, in my judgment no rival manufacturer has the right to appropriate to himself either the name A. or B. Therefore that does not in any way shake the conclusion which I have come to. Now, having arrived at the conclusion that the goods of the plaintiffs which bore the trade-mark in question were known as the 'Two Elephants' or 'Bhé Hathi' goods, it follows, in my judgment, that two elephants were a material and substantial part of the plaintiffs' ticket, because they were that part of the ticket which communicated this name to the goods. Lord Westbury, in the case to which my attention has been drawn (*Edelsten* v. *Edelsten*, *ubi supra*), observed upon the fact that the goods derived their trade name from that particular part of the ticket. I think, therefore, that where the defendants did take these two elephants they took that which was a material and substantial part of the plaintiffs' ticket. Now, what is the result of that? It appears to me that the result of that is this, to throw upon the defendants the burden of proving that their ticket did not deceive purchasers, so that they should believe that the defendants' goods were the plaintiffs' goods. In the case of *Ford* v. *Forster*, James, L. J., makes this observation: 'The plaintiff makes this *primâ facie* case, that he has a plain trade-mark, a material and substantial part of which has been taken by the defendants. Then the onus is, under those circumstances, cast upon the defendants to relieve themselves from that *primâ facie* liability.' It appears to me to be in accordance with the view of the Lord Justice that Lord O'Hagan made the observations in the case of *The Singer Machine Manufacturing Company* v. *Wilson*, in the House of Lords (p. 395), to which my attention has been drawn this morning: 'If one man will use a name the use of which has been validly appropriated by another, he ought to use it under such circumstances and with such sufficient precautions that the reasonable probability of error should be avoided, notwithstanding the want of care and caution which is so commonly exhibited in the course of human affairs. I do not say that the mere possibility of deception should suffice to make appropriation improper, but the chance of misleading should be jealously estimated with a view to this consideration, even

Co., of Alexandria, by whom they were sold, such watches bearing on the dial the word "*Tod*," in Arabic characters (and that word, when treated as an Arabic substantive, denoting "a high mountain"), applied for the registration of that Arabic word as their trade-mark, but registration was re-

though ordinary attention might have been enough to protect from mistake.'

"It appears to me that I ought, therefore, to hold that, if one man will appropriate to himself a material and substantial part of the ticket of another man, which has been used for the purpose of indicating his goods, he ought so to appropriate it with such precautions, that reasonable probability of error should be avoided, and therefore I proceed to inquire whether the defendants have in this case so appropriated that material part, which I hold that they have appropriated, with those due precautions to prevent error. Now, it strikes one at first, in considering and answering that question, that the defendants have thought fit to print the name of their firm upon the ticket B. in a language which would be read undoubtedly by the original purchasers of the goods, but which will not be read by the ultimate purchasers in the Indian markets, and therefore the protection which would be given by a name capable of being read wherever the goods go is not afforded by their ticket. To explain that, it is necessary I should observe that, according to the evidence before me at present, when those goods reach Bombay they pass generally into the hands of merchants dealing in a wholesale manner; that they are then distributed through the intervention of a series of middle-men; and Mr. Dick has explained clearly that there are numerous classes of middle-men employed in the distribution of these goods over the country. Now, the first class of customers would probably, in my judgment, not be deceived; but I think, upon the whole of the evidence before me, that there is a strong probability that the ultimate purchasers, the weavers who buy these goods in the villages, probably also the retail dealers who sell to them, would be deceived by the defendants' ticket, and the grounds upon which I have arrived at that conclusion are put as forcibly as they can be by Goolalehund, who is a dealer in English yarn in Bombay, who says that in his opinion the native buyers would be deceived because they would ask for 'Bhé Hathi, and there,' he continued, referring I understand to the defendants' ticket, 'are Bhé Hathi.' It appears to me that there is a great deal of evidence to which I attach weight to show that these goods are sold largely by name, and that, although the first dealers no doubt look at the tickets, and the brokers in Bombay probably look at the tickets, yet that the ultimate purchasers and the purchasers from the dealers in Bombay probably do not look at the tickets, and at any rate are liable to be deceived by the name by which the goods are sold. In coming to that conclusion, I do not forget that there is a conflict of evidence upon the point; that there are those who say that native buyers will not be deceived, and there are many who say that the ticket would be known as the Gunputty ticket; that there are those who say that the goods exported by the defendants have received the name of the Gunputty; but it seems to me that the burden resting, as I hold that it does, on the defendants to show that they have used all due precaution to prevent deception and error, they have failed to discharge that burden."

fused by the registrar, on the ground that he was instructed by the Commissioners of Patents not to register words in foreign languages.

On motion by the applicants, *Held*, that the direction given by the commissioners was contrary to the act and *ultra vires*, and that the registration must proceed.

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648. Gillespie & Co. *v.* Marshall.

April 7, 1879. *Ct. of App.: Brett, Cotton, and Thesiger, L. JJ.*

THE plaintiffs, agents for a Canadian firm, contracted with the defendant, a sheet-iron manufacturer, to purchase from him a quantity of "*Marshall's Canada Plates.*" The term "*Canada Plates*" was proved to have come within the previous twelve years to mean plates of iron for roofing purposes, rolled in a particular manner with respect to grain, and to be usually made by tin-plate makers. Formerly "*Canada Plates*" were mere plates of sheet-iron cut irrespective of grain, and the defendant, who had occasionally supplied such plates, and on one occasion to the plaintiffs themselves, under the name and mark of "*Marshall's Canada Plates*," now supplied the same article to the plaintiffs, by whom the plates were shipped to their principals in Canada. The latter objected to the quality, and resold them at a loss.

Action by the plaintiffs to recover the amount of the loss on the resale.

The jury having found at the trial — (1.) that the contract was for Canada plates as made by Marshall; (2.) that the plates were reasonably merchantable; (3.) that the goods were not in the commercial sense "Canada plates;" on which verdict judgment was entered for the defendant:

Held, on appeal, by Brett and Thesiger, L. JJ., that the contract was for the goods usually supplied by the defendant under the name of "Marshall's Canada Plates," that the defendant was justified in supplying those goods, and that the judgment must stand.

Held, by Cotton, L. J., that the contract was for "*Canada*

Plates," in the commercial sense, to be of Marshall's manufacture, there being no evidence to show that "*Marshall's*" plates had a different meaning in the market, and that the plaintiffs were entitled to judgment.

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649. In re Brebner.

April 30, 1863. *Victoria Sup. Ct.: Molesworth, J.* — 2 *W. & W.* (*l. E. & M.*) 12.

On appeal from a decision of the Geelong District Commissioner of Insolvent Estates, by which the appellant, an insolvent, was refused his certificate on various grounds, among which was one that he had squandered his means in litigation, he having infringed a trade-mark used by other persons on flour, which led to a litigation, which he had to compromise at considerable expense.

Held, that the certificate should be suspended for a year, but not refused.

"The last ground of objection is the general conduct of the insolvent, and under this head comes the imputation against him of having imitated the brands or trade-marks of another person. I must regard this as a great dishonesty. It is depriving another man of the benefit of his good name. He is fairly entitled to the benefit of the repute which he has obtained for personal skill and honesty, or the good quality of his produce; and another person who deprives him of that robs him of his own. Such person, indeed, not only takes that which does not belong to him, but risks the loss by the true owner of his good repute altogether, when an inferior article is substituted for the genuine one. It is also a fraud on the purchaser. Whether he rightly or wrongly thinks an article produced by a particular person to be a superior one, he is cheated if an article made by another person is substituted. It is no answer to say to the purchaser, 'I gave you an article substantially as good as that which is represented;' he would not have given his money at all if he had known the article was made by another person. If a man wants an article of oak, and gets an article of deal, and pays an oak price, it is no answer to say that deal will do as well. A fraud of this sort must also have been accompanied with a great deal of deliberation and contrivance; there

must have been combination and systematic continuous action resolved upon and carried out."

650. Hennessy *v.* White.

April 5, September 2, 1869. *Victoria Sup. Ct.: Molesworth, J.* — 6 *W. W. & A'B. Eq.* 216. *Victoria Sup. Ct.:* 6 *W. W. & A'B. Eq.* 221.

THE plaintiffs being brandy merchants, of Cognac, who sold their brandy in cask and in bottle, the latter being of the better quality, and who placed on their bottles certain distinctive labels, corks, and capsules, the defendants purchased a large quantity of the plaintiffs' inferior or cask brandy, and sold it in bottles bearing labels, corks, and capsules of a similar shape, color, and design to the plaintiffs', except that instead of "*Jas. Hennessy & Co., Cognac*," on the plaintiffs' labels, corks, and capsules, the defendants' had "*Jas. Hennessy & Co.'s Cognac;*" that instead of an arm with a battle-axe on the plaintiffs' they had a spread eagle; and that the defendants' labels also had in small letters the words "*Bottled by T. & W. White, Melbourne.*" And there were some minor differences.

On motion by the plaintiffs:

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

Per Molesworth, J. "According to the authorities, an intention to produce a mistake is sufficient to warrant the interference of this court by injunction. According to the authorities, also, it is not necessary that the intention should be to deceive persons who carefully examine. It is enough that there are a class of customers who examine so carelessly that they would be deceived by the resemblance between the two."

"I think a new feature which has not been present in any other case, and is, therefore, not touched by the language of the other cases, is one which I ought to act upon here; that is, that the makers of articles of different qualities are entitled to brand their best article in a particular way, to show the superior value they put upon it. . . . . I put this case upon the particular ground, that an article of Hennessy & Co.'s manufacture of a higher quality has had a particular

mark used for it, and that the defendants' brand is an attempt to deceive, probably not the direct purchaser of the article, but the ultimate consumer."

Per Stawell, C. J. "If a brandy different from that which the manufacturer bottled is put into bottles and sold as the manufacturer's bottled brandy, the fact that it is the manufacturer's bulk brandy does not make the sale less an imposition."

"We were invited to consider the arm and battle-axe on the respondents' label as their trade-mark, and, because it was not adopted by the appellant, to disregard all other matters as of no importance; but this is precisely the course which the courts have carefully avoided, namely, selecting any one or more matters, either of resemblance or difference, and considering them essential, or attempting to define *à priori* what might or might not constitute an improper imitation by one person of the manufacture of another, for such a course would manifestly offer inducements for fraud; persons so disposed would then endeavor to avoid the one or more objectionable points, but yet so present the particular article for sale as to impose on the unwary, who accept as sufficient proof of genuineness a resemblance in the main, without closely examining details. An imitation of the trade-mark would, no doubt, render the case still stronger against the appellant; but the mere substitution of one mark for another, both being in the same position and of the same color, does not, in our opinion, neutralize the effect of all the other points of resemblance."

651. Hennessy *v.* Hogan.

April 29, 1869. *Victoria Sup. Ct.: Molesworth, J.* — 6 *W. W. & A'B. Eq.* 225.

THE plaintiffs being brandy merchants, of Cognac, who sold their brandy in cask and in bottle, the latter being of the better quality, and who placed on their bottles certain distinctive labels, corks, and capsules, the defendants purchased a quantity of the plaintiffs' inferior or cask brandy, and sold it in bottles bearing labels, corks, and capsules of a similar shape, color, and design to the plaintiffs', except that the name of the plaintiffs did not appear on the defendants' corks and capsules; that the defendants used the device of an arm holding a dart, instead of an arm holding a battle-axe; and that the

defendants placed on their labels, in bold type, the words "*Bottled by Hogan, Money & Co.*"

On motion by the plaintiffs:

Injunction granted to restrain the defendants from infringing the plaintiffs' rights.

"It is not necessary that the imitation should be such as to deceive a person accurately scrutinizing it. It is sufficient if it is done with the intention of deceiving any class of purchasers, or to enable subvendees to make the article in question more attractive."

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652. Hostetter *v.* Anderson.

February 17, 1870. *Victoria Sup. Ct.: Molesworth, J.* — 1 *V. R.* (1 *W. A'B. & W.*) *Eq.* 7; 1 *A. J.* 4.

THE plaintiffs being American manufacturers of bitters, which they sold in bottles having the words "*Dr. J. Hostetter's Stomach Bitters*" moulded in them, and labelled with the words "*Hostetter's Celebrated Stomach Bitters*," the defendants bought up a considerable quantity of the plaintiffs' moulded bottles, and sold them refilled with other bitters, and labelled "*Celebrated Stomach Bitters*," but the labels did not in form or color resemble those used by the plaintiffs.

On motion by the plaintiffs injunction granted to restrain the defendants from infringing the plaintiffs' rights.

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653. Wolfe *v.* Hart.

July 8, September 19, 1878. *Victoria Sup. Ct.: Molesworth, J.* — 4 *Vict. L. R. Eq.* 125. *Victoria Sup. Ct.* — 4 *Vict. L. R. Eq.* 134.

THE plaintiff selling gin under the name of "*Udolpho Wolfe's Aromatic Schiedam Schnapps*," in square moulded bottles, enclosed in wrappers bearing inscriptions in blue and red inks, the defendant, a former agent for the plaintiff, began to sell gin under the name of "*Hart's Imperial Schiedam Schnapps*," or "*Imperial Schiedam Aromatic Schnapps*," and to sell them in somewhat similar bottles, enclosed in somewhat similar wrappers to the plaintiff's.

On motion by the plaintiff for an injunction to restrain the defendant from infringing the plaintiff's rights:

Held, by Molesworth, J., that the words "*Aromatic Schiedam Schnapps*" were descriptive and incapable of appropriation, but that the bottles and wrappers were intended and calculated to deceive, and that an injunction must be granted in that respect.

Held, on appeal to the full court, that the injunction must be affirmed as granted.

Per Stawell, C. J. "Nor do I concur in the argument that we are to consider the intelligence or want of intelligence of the purchaser. We ought not to pronounce a decision which would be applicable to the one and inapplicable to the other, or ignore an uneducated and illiterate person, who may desire to ascertain whether the article he is about to purchase is the same he has had before. We are to consider whether the infringement of the plaintiff's rights has been proved, not by taking particular isolated points, but by looking at the general resemblance of the packages, labels, bottles, and other points."

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654. In re Farina [T. M. A. 1875]. (3.)

April 22, 1879. *Hall, V. C.*

J. M. FARINA having long used, and recently registered, two trade-marks on Eau-de-Cologne, consisting respectively of a label with his signature and flourish, the words "*Gegenüber dem Jülichs Platz*," and a seal in the corner, to be applied to the side of the bottle, and a label bearing a circular seal with three parallel lines running from it, to be applied to the top and neck of the bottle, another manufacturer used on the sides of his bottles a label of similar appearance bearing the signature "Joseph Anton Farina, Gegenüber dem Central Bahnhof," with a similar flourish, and with a similar seal in the corner, and on the tops and necks of his bottles a label with a circular seal and three parallel lines, similar to J. M. Farina's second label, though differing in some details. The latter manufacturer applied for the registration of the two circular seals used respectively in the corner of the first

label and on the top of the bottle, without other accompaniments.

On motion by J. M. Farina for an injunction to restrain the rival manufacturer from proceeding with his application for registration, *Held*, (1.) that the two seals might be registered, but only, as to the first, with a note that it was not to be used with, or as part of any label similar to or only colorably differing from, J. M. Farina's first label; and, as to the last, with a note that it was not to be used upon the top or cork of any bottle of Eau-de-Cologne, or with or as part of any label similar to, or only colorably differing from, J. M. Farina's second label; (2.) that the applicant for registration must pay the agreed costs of the application.

655. In re Worthington & Co.

May 9, 1879. *Jessel, M. R.*

BASS & CO. having long used and since registered as their trade-mark on ale and beer (included in class 43) the figure of a triangle, which in practice was colored red, and from which the beer was known as "triangle beer," Worthington & Co. applied for the registration of a new mark to be used on beer, wine, and spirits (all these articles being included in the same class, No. 43, in which Bass & Co.'s mark was registered), such new mark, consisting of a triangular device which contained a church in the centre, and the words "*Beccles Brewery — Established 1830*," in a border.

On motion by Bass & Co. injunction granted to restrain Worthington & Co. from taking any further proceedings for the purpose of obtaining the registration for which they applied, on the ground that the marks were so similar as to render deception probable.

656. Royal Baking Powder Co. *v.* Royal Chemical Co.

1873. *N. Y. Superior Court. Not reported.*

THE plaintiffs being manufacturers of baking-powder applied the designation "*Royal*" to their product. Defendant

used its corporate name upon the same class of goods, giving a special prominence to the word "*Royal.*"

Action for an injunction and account.

Held, that the word "*Royal*," as used by plaintiff, was a valid trade-mark, that the same had been infringed by defendant, and that plaintiff was entitled to an injunction as prayed for with costs.[1]

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657. Procter & Gamble *v.* McBride et al.

1875. *C. C. U. S. N. D. Ill.* — 18 *U. S. Pat. Gaz.* 1278.

THE report of this case is in the language of Judge Blodgett of the court in which it was decided:

"A suit was brought by Procter & Gamble against McBride & Co., of this city, to enjoin the use of a trade-mark which had been adopted by Procter & Gamble for a certain brand of soap which they manufactured. Procter & Gamble claimed that they had introduced to the public, under a trade-mark of their own, a brand of soap under the term and designation of '*Mottled German Soap*,' and they had adopted as a trade-mark upon their packages those words with a circle with a moon and stars in the middle. The defendants, McBride & Co., who were manufacturers in this city, had put upon the market a brand of soap which they termed '*S. W. McBride's German Mottled Soap*,' and they had marked these words upon the outside of their packages in combination with a crescent, within which was a single star instead of a number of stars. . . . . The defendants departed widely from the complainant's trade-mark. They changed the arrangement of the words, so instead of its being '*Mottled German* Soap' it was '*German Mottled* Soap,' and instead of a circle containing several stars it was a crescent containing a single star prefixed by the name of each maker; and it was argued in that case there could be no possibility of intelligent consumers being deceived. So strong was the case made before me on an application for an injunction that I refused

[1] In an action by the same plaintiffs against Sherrill *et al.*, in the N. Y. Supreme Court, the word "*Royal*" was sustained as a mark for flavoring extracts as against the words "*Royal Standard;*" and in an action in the same court against Jenkins *et al.*, it was held that the word "*Royalty*" was an infringement of "*Royal*" applied to baking powder. See *R. B. P. Co.* v. *McQuade*, 674.

the injunction; but after the proofs were taken and the case brought to hearing before Judge Drummond, he sustained the infringement and ordered a perpetual injunction against the defendants. It was also shown in that case that "mottled German soap" or "mottled soap' had been in common use in the trade for nearly fifty years, and that 'mottled soap' was a commodity well known to the trade; but Judge Drummond sustained that trade-mark, as the exclusive property of the complainant, and held that the defendants infringed."

658. United States *v.* Steffens.

S. C. U. S.

Held, that the acts of Congress providing for the registration of trade-marks are unconstitutional and void.

659. Singer Manufacturing Co. *v.* Larsen.

1878. *C. C. U. S. N. Dist. Ill.* — *Chicago L. N. November* 6, 1880.

Held, that the complainant could not enjoy an exclusive right to the name or designation "*Singer*," the same being a word descriptive of a particular kind of machine.

Drummond, J. "As I understand this case, I think there can be no doubt that the plaintiff cannot claim the exclusive right to manufacture the '*Singer Sewing Machine.*' All that it can claim is to make a machine of its own peculiar manufacture, with a device so that it becomes in the nature of a trade-mark. Otherwise, after a patent has expired which has established the nomenclature of a sewing-machine, as the Howe patent, or the Wilson patent, the patentee might go on and have the benefit of the patent indefinitely.

"On a machine called '*The Singer Sewing-Machine*' there were various patents. These patents have all expired, and nothing can therefore be claimed under them. Other persons cannot be prevented from manufacturing a machine like the Singer sewing-machine, and which may be called, to distinguish it from other machines, '*Singer's Sewing-Machine.*' If a sewing-machine has acquired a name which designates a mechanism or a peculiar construction, parts of which are protected by patents, other persons, after the expiration of the patents, have the right to construct the machine and call it by that name, because that only expresses the kind and quality of the machine. I

have read the reports of the case of the *Singer Manufacturing Company* v. *Wilson* (477), ... and I do not know that I controvert the general rule there laid down, that there must be something to indicate that the thing manufactured is not the same as that of the complainant; in other words, to show it is not manufactured by the plaintiff. That is, it is a question of manufacture, not of name. A person could not claim a right to construct a peculiar form of barrel as to dimensions and capacity, irrespective of any marks or brands impressed upon it. That of itself could not be a lawful trade-mark. The same rule would be applicable to the construction of a wagon or carriage, which, owing to some peculiarity, might possess a particular name as that of the original manufacturer. A man might construct a wagon or carriage precisely like it, and he would not be liable if he did not claim in some form that it was constructed by the manufacturer. The only principle upon which an action can be sustained under such circumstances, as I understand, is through a trade-mark. If there were a valid trade-mark called a '*Singer Machine*,' then there would be some force in the plaintiff's claim. Here the plaintiff and the defendant have a trade-mark somewhat similar, and if there is on the machine manufactured by the plaintiff a valid trade-mark to indicate that it is of the plaintiff's manufacture, no one else ought to be permitted to put anything on his machine to show that it has been manufactured by the plaintiff; that is, to use the same trade-mark. It may be the defendant has made his machine to imitate the plaintiff's, and to induce people to believe that it is the same. But as I have said, I do not think, under the circumstances of this case, there can be a trade-mark for the name, '*Singer Sewing-Machine*."

"An illustration is furnished in the opinion of the Lord Chancellor in the House of Lords in the case already referred to. A carriage called a 'brougham' had been in very general use for many years. If that were devised by a man of the same name, so that, from its peculiarity of construction it was generally known by that name, it certainly cannot be claimed that the man who devised it, or his assignees, would have a right to construct a 'brougham' for all time to come. If no patent existed upon it, or any of its parts, any one who has the requisite skill could construct just such a 'brougham' as was originally constructed. There could in such a case be no trade-mark which the law would protect in the name 'brougham,' and I therefore do not think that the opinion of the House of Lords can be construed

to mean what is claimed by the counsel of the plaintiff in this case. So that, while I hold that the defendant is not prevented from constructing a '*Singer Sewing-Machine*,' still, he cannot be permitted to do any act the necessary effect of which will be to intimate, or to make any one believe, that the machine which he constructs and sells is manufactured by the plaintiff. Neither has he the right to use any device which may be properly considered a trade-mark, so as to induce the public to believe that his machine has been manufactured by the plaintiff; and, therefore, I shall modify the injunction in this case by simply requiring the defendant to refrain from selling any Singer sewing-machines manufactured by any person or company other than the plaintiff, without indicating in some distinct manner that the said machines were not manufactured by the Singer Manufacturing Company." [1]

660. Wamsutta Mills *v.* Allen.

1878. *Com. Pl. of Phila.* — *P. W. N.*

COMPLAINANT alleged that it had long been accustomed to attach the name "*Wamsutta Mills*" to cotton or muslin shirtings manufactured by it, that its goods had become well known as "*Wamsutta*" muslins, that the defendants, dealers in gentlemen's furnishing goods, were using the name "*Wamyesta*" on shirts made from muslin of an inferior quality, and advertising their shirts as made of "*Wamyesta*" muslin, whereas there was no such brand of muslin known.

Action for injunction and account.

Held, that complainant was entitled to an injunction to restrain the use by defendants of the word "*Wamyesta*" on shirts not made of complainant's goods.

[1] See *Singer Man. Co.* v. *Brill.* It cannot be disrespectful to remark, that it is not difficult to understand how it might be open to the public to use a mark as follows: —

LARSEN'S SEWING-MACHINE.

Made according to the principle of the Singer machine.

and still be fraudulent to use the following: —

THE SINGER MACHINE.

☞ This machine was manufactured by Larsen.

The Court. "It must be obvious that the question is not whether experts would be deceived, but rather whether persons who buy would probably be deceived by the name which the defendants have adopted. Upon this point we are of opinion that the resemblance between the two words is of a character to deceive and mislead a certain class of purchasers — those who are acquainted with the reputation of the Wamsutta muslin, but who have little knowledge of the fabric itself. Such persons might readily confuse the two names and purchase the defendants' shirts for shirts made of the plaintiffs' muslin. 'Wamyesta' might well be mistaken by many people for 'Wamsutta,' in view of the fact that, as appears by the proofs, there is only one muslin manufactured which is known by a name resembling that which the defendants use. It is difficult to conceive that the defendants have adopted this name innocently or by accident. The resemblance is strongly suggestive of the hypothesis that the defendants have adopted it because of the facility with which the two words may be confused in the minds of a certain class of purchasers. I need not cite authorities to show that a man may acquire property in a trade-mark, or that having acquired it he is entitled to the restraining process of a court of equity to prevent the injury he will experience by its being unlawfully appropriated or imitated by others. . . . .

"As to the point made by the defendants that the plaintiffs are manufacturers of muslins and the defendants are manufacturers of shirts, and therefore the plaintiffs cannot complain of the use of their trade-mark, or a servile imitation of it by defendants when affixed to their shirts, we do not see the force of such reasoning. It is too plain to require any demonstration that if the defendants manufacture shirts of a muslin greatly inferior in quality to the plaintiffs' muslin, and pass them off upon the public as shirts made of the plaintiffs' muslin, the plaintiffs may suffer greatly thereby in their reputation as manufacturers, and consequently in their sales of the muslin which they manufacture. Against this injury the plaintiffs are entitled to be protected by the writ of injunction."

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661. Kelly *v.* Byles.

1879. 40 *L. T.* 623.

PLAINTIFF had published since 1852, numerous trade directories, which he called "*post office*" directories, and was the

registered proprietor of "*The Post Office Directory of the West Riding of Yorkshire.*" The defendants compiled a directory of the town of Bradford, which they proposed to call the "*Post Office Bradford Directory.*" In an action to restrain the use of the words "*post office*," etc., *Held*, that the taking of part of the title of a registered copyright work without fraud, and without any circumstances from which an *animus furandi* could be inferred, was not an infringement; that as to plaintiff's property in the name "*post office*," as a *quasi* trade-mark, a right of that kind could only attach where the wares offered for sale were so nearly identical that the use of the particular trade-mark or name might mislead unwary purchasers.

662. Williams *v.* Adams.

1879. *C. C. U. S. N. Dist. Ill.* — 7 *Rep.* 613.

COMPLAINANT had long used the word "*Yankee*" to designate his soap; defendant used the same word on similar goods. On suit in equity, *Held*, that the word "*Yankee*" was a valid trade-mark, and that complainant was entitled to an injunction.

663. Wharton *v.* Thurber et al.

1879. *Supreme Court N. Y.; General Term. Not reported.*

PLAINTIFF used as a trade-mark for his whiskey the words "*Chestnut Grove;*" defendants inadvertently employed the same designation, but, upon being notified, discontinued its use.

Action for injunction and account. Injunction granted, but without costs or damages.

664. Taylor *v.* Bothin.

1879. *U. S. C. C. Dist. Cal.* — 8 *Rep.* 516.

IT appeared that complainant had discovered a process for making a valuable yeast powder, and that afterward with de-

fendant had manufactured and sold the same under the name of "*Mrs. Mills' Cream.*" In the second year of their connection, defendant secretly applied to the patent office and registered the words "*Mrs. Mills' Cream*" as a trade-mark for the powder.

On a suit in equity, *Held*, that the registration was invalid, and that the parties were equally entitled to use the name "*Mrs. Mills' Cream.*"

Field, J. "The only serious question for deliberation is, whether the complainant is entitled to the exclusive use of the trade-mark, or only to a joint or equal use of it with the defendant. Had the name been suggested and used by the complainant before the business connection with the defendant, there would be no doubt of his exclusive right to it. But it having been suggested and adopted after that connection was formed, upon a consultation of the parties on the subject, and then used for their joint benefit, we are led to the conclusion that they are equally entitled to its use after that connection ceased. Clearly the defendant has no such exclusive right, and the representations which he must have made to obtain the letters of registration required by law, "that no other person, firm, or corporation" had the right to its use, are inconsistent with the facts. It matters not whether the arrangement between the parties constituted a partnership, or whether the complainant was to receive a portion of the profits of the business as his salary; in either case, it was his process of making a valuable powder which was to be used, and it was to his discovery that the name was to be given. We do not understand that when the complainant said he gave his process to the defendant, he intended to abandon all right to the use of it, and to the manufacture of the powder designated by its new name; but only that he made the defendant acquainted with the secret of the process — the manner in which the powder was to be made. Having imparted that knowledge, and the two, in conjunction, having subsequently adopted the name, they must be regarded as equally having the right to use it."

665. Consolidated Fruit Jar Co. *v.* Thomas.

1879. *C. C. U. S. Dist. N. J. Not yet reported.*

THE Consolidated Fruit Jar Company had used as a trade-mark a monogram, consisting of the initials of its corporate name, which it applied to its goods in characteristic ways; defendant sold goods of the same nature, to which a monogram composed of different letters had been applied, to all the intents and purposes, in the precise manner that had been practised by complainant. On motion for preliminary injunction, *Held*, that complainant was entitled to an injunction; and that the fact that it had neglected to sue for a considerable period was immaterial as affecting the issuance of the writ.

Per Nixon, J. "There is no difficulty about this case in regard to the infringement. The embarrassment arises in determining to what extent the injunction should go, or what it should include.

"The complainant corporation and the Hero Glass Works, which are the producers of the articles complained of, are the principal makers of fruit-jar caps in the country; any interference with the business of the one would practically give a monopoly to the other. But such a consideration should not and will not hinder the court from protecting the complainants in all their rights. The question of infringement is ordinarily more easily determinable in trade-mark cases than in patent cases, because they are less dependent upon the testimony of witnesses. Whether one thing is a colorable imitation of another is answered most satisfactorily by judicial inspection and comparison of the two; and if the court is convinced by such inspection and comparison that the two things are near enough alike to deceive or mislead the ordinary purchaser in the exercise of ordinary care and caution, no amount of expert evidence of substantial differences would justify the court in withholding the injunction.

"The infringement by the defendant is clear; the monograms differ because the letters are not the same; but it is not necessary for the complainants to show an exact imitation or similarity before they are entitled to the protection of the court. No matter how vague may be the resemblance, if it be sufficient to mislead the public, it is unlawful, and, when unexplained, it is the duty of the court to infer in-

tent, and to hold that the resemblance was adopted for the purpose of deception. . . . .

"It is difficult to lay down a general rule, which will be applicable to all cases, of what constitutes the infringement of a trade-mark. It may be said, however, as was substantially held by the Supreme Court in *McLean* v. *Fleming* (6 Otto, 245) [580], that an injunction should be granted when the imitation is so close, that by the form, marks, contents, words, or their special arrangement, or by the general appearance of the infringing device, purchasers exercising ordinary caution are liable to be misled into buying the article bearing it for the genuine one.

"Both parties in the present case have the right to manufacture and sell fruit-jar caps. The complainants have adopted and registered as their trade-mark a monogram composed of the initial letters of the corporation name. They began its use early in the year 1878, to distinguish their manufacture from the product of other houses, and particularly of their great rival, the Hero Glass Works. They placed the monogram on the circular depression on the top of the cap. The caps were put up for the market in wooden boxes, in each end of which the trade-mark was printed in red ink. Each box was also furnished with printed circulars on which the monogram appears near the bottom between the words 'like' and 'this.'

"The jar caps in the defendant's possession have also a monogram, put in the circular depression on the head of each cap; the same was also printed in red ink on the end of the wooden boxes containing the caps, and the boxes are supplied with circulars in a style of printing to give them the general appearance of the complainants' circulars, and also showing in the same relative position a printed monogram between the words 'like' and 'this.'

"It is proved that all these resemblances have been adopted and used by the manufacturers of the defendant's caps since the registry and use of the complainants' trade-mark. They are not accidental, but intentional and misleading, and therefore unlawful.

"The court suggested to counsel on the argument, that the delay of the complainants in applying to the court for the injunction until the season for furnishing fruit-jar caps had fully arrived, had a suspicious aspect, and that we should be reluctant to interfere with the defendant whatever might be the legal rights of the complainants if there had been laches in bringing the suit. The suggestion was, perhaps, un-

called for by the facts of the case, but it was prompted by the extreme sensitiveness which always springs up, when any disposition is suspected of using the process of the court to obtain a temporary business advantage.

"There has been large discussion of the question how far laches, in stopping the infringement of a trade-mark, will deprive a complainant of the benefits of a preliminary injunction. But that discussion has been put to rest, so far as this court is concerned, by the recent decision of the Supreme Court in the case of *McLean* v. *Fleming*, *supra*, where it was held that acquiescence of long standing was no bar to an injunction, although it precluded the party acquiescing from any right to an account for past profits.

"This was only anticipating the later decision of the High Court of Justice in England in the case of *Fullwood* v. *Fullwood*, 9 L. R. Ch. Div. 176 [**602**], where the single question involved was the effect of delay in prosecuting for the infringement of a trade-mark, and where the defendant set up as a defence to an application for an injunction, that the plaintiff had known all the material facts stated in the pleadings for a period of at least two or three years before the action was brought. The court said this was no defence, and that where an injunction is sought in aid of a legal right mere lapse of time was no bar to granting it. The injunction was treated as always a matter of course, if it appeared that the legal right existed.

"The court is of the opinion that the complainants are entitled to an injunction restraining the defendant *pendente lite* from the use of the monogram on the fruit jar caps, and on the ends of the boxes, and from circulating the printed circulars so closely resembling the circulars of the complainants, and it is ordered accordingly."

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666. Kidd *v.* Johnson.

1879. *S. C. U. S. To appear in* 102 *U. S.*

In 1849 one S. N. Pike, doing business in Cincinnati as wholesale dealer in whiskey, adopted as a trade-mark for his manufacture the words "*S. N. Pike's Magnolia Whiskey, Cincinnati, Ohio*," enclosed in a circle, which he placed on packages containing the liquor. Between that date and 1863 he was in partnership with different persons, doing business there under the name of S. N. Pike & Co. In 1863, having

dissolved his connection with others, he took as partners two of his former clerks, Tilney and Kidd, continuing the original firm name. The same trade-mark was used by the new firm as it had been by the preceding firm, without any change. At this time, and subsequently until its sale in 1868, the real property in Cincinnati, upon which the business was conducted, and the distillery, with its fixtures and appurtenances, belonged to Pike individually. In 1868 the firm removed its entire business to New York city, and Pike sold the real property in Cincinnati, and the stills, tubs, engines, boilers, tubing, and all apparatus in his distillery, to the firm of Mills, Johnson & Co., who were also engaged in the manufacture and sale of whiskey at that place. At the same time Pike executed and delivered to the purchasers a separate instrument, stating that, having sold his premises to them, he extended to them and their successors the use of all his brands formerly used by him in his Cincinnati house.

Mills, Johnson & Co. continued for some years the manufacture and sale of whiskey on the premises thus purchased, using without objection from any one the brands previously used by S. N. Pike & Co. They were succeeded in business by the complainants, who, it is admitted, are entitled to all the rights which they possessed in the trade-mark in question. S. N. Pike died in 1872, and his surviving partners formed a new partnership, under the name of George W. Kidd & Co., which was subsequently dissolved, and to its business Kidd, the appellant in this case, succeeded.

Held, that the trade-mark was the exclusive property of Mills, Johnson & Co.

Per Field, J. "As to the right of Pike to dispose of his trade-mark in connection with the establishment where the liquor was manufactured, we do not think there can be any reasonable doubt. It is true, the primary object of a trade-mark is to indicate by its meaning or association the origin of the article to which it is affixed. As distinct property, separate from the article created by the original producer or manufacturer, it may not be the subject of sale. But when the trade-mark is affixed to articles manufactured at a particular

establishment and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred either by contract or operation of law to others, the right to the use of the trade-mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place and are of the same character as those to which the mark was attached by its original designer."

667. Sawyer *v.* Horn.

1880. *C. C. U. S. Dis. Md. Not yet reported.*

COMPLAINANT alleged that to individualize and identify his bluing he adopted a peculiar and original form or style of package, consisting of a blue cylinder having a red top, and that his goods had long been known and identified *by consumers* by the peculiar appearance of the package.

It was, also, set forth that his method of packing, including the size, shape, and color of his cartoons or large packages, was original with him, and had never been varied.

The respondent was shown to have knowingly made and sold bluing put up in boxes and packages which involved the employment of imitations of all the leading incidents and features of complainant's article; complainant's goods being copied in substantially every particular, except that defendant used his own name and made changes in the phraseology of his labels.

Suit in equity for injunction and account.

Held, that complainant was entitled to an injunction restraining the imitation of his package, and to an accounting as prayed.

Per Morris, J. "We have come to the conclusion in the case before us, that the respondent should be enjoined from putting up his goods in the manner in which he has been doing as shown by the exhibit, or in any other manner so simulating the form, color, labels, and appearance given by the complainant to his goods as to mislead purchasers into mistaking one for the other.

"What we decide is, that whether the complainant has a trade-mark or not, as he was the first to put up bluing for sale in the peculiarly shaped and labelled boxes adopted by him, and as his goods have become known to purchasers and are bought as the goods of the complainant by reason of their peculiar shape, color, and label, no person has the right to use the complainant's form of package, color, or label, or any imitation thereof, in such manner as to mislead purchasers into buying his goods for those of the complainant, whether they be better or worse in quality.

"And finding from the exhibits and proof in the cause that the bluing put up by the respondent is not only well calculated so to mislead purchasers, but has actually done so to the injury of the complainant, we are of opinion that respondent should be perpetually enjoined, and that he should account to the complainant for the damages sustained by him."

The final decree was as follows:—

"This cause having come on to be finally heard at this, the term aforesaid, upon the pleadings and proofs, and having been fully argued by the counsel for the respective parties, and fully considered by the court, it is thereupon, this 17th day of February, in the year 1880, by the Circuit Court of the United States, in and for the District of Maryland, adjudged, ordered, and decreed:

"I. That heretofore, to wit, as early as the year 1866, the complainant was engaged in the manufacture of bluing, at the city of Boston, in the State of Massachusetts, and that, in order to distinguish and identify his bluing from that of all other producers, he caused the same to be packed in cylindrical boxes enclosed in a blue label and provided with a red seal at their tops, each box arranged to present the appearance of a blue cylinder having a red top as shown with sufficient accuracy in the illustration marked 'complainant's small box,' and hereto appended and made a part hereof; that such box presenting the appearance, to wit: the appearance of a blue cylinder having a red top, was originated and first used by the complainant, and by him adopted as a means of distinguishing and identifying the bluing made by him, and has been employed by him continuously, since the day of its first use and adoption, to indicate and signify the origin of his goods.

"II. That the complainant's bluing is generally known and identified by consumers in the city of Baltimore and elsewhere by the

appearance of the said box by him originated and used as aforesaid, to wit: as being packed in a blue cylinder having a red top.

"III. That the respondent, James G. Horn, has violated and infringed the rights of the complainant by preparing and vending blue in boxes having the appearance of blue cylinders with red tops, and prepared in such close imitation of complainant's bluing as to deceive the public and cause respondent's bluing to be purchased by consumers as and for the bluing of complainant.

"IV. And it is further adjudged, ordered, and decreed that an injunction issue perpetually enjoining and restraining the respondent, James G. Horn, his servants, agents, and workmen, and all persons acting for him or under his directions, from packing, or selling, or offering to sell bluing put up in boxes with labels in imitation of the boxes and labels used by complainant, as shown in these proceedings, to wit, in cylindrical boxes with blue labels and red tops (one of said respondent's boxes being hereto appended), and from putting up, packing, selling, or offering to sell any bluing prepared in any manner so similar to the boxes, labels, and appearance of complainant's bluing as to cause confusion in the market and mislead purchasers into mistaking respondent's bluing for the bluing prepared by the complainant.

"V. And it is further adjudged, ordered, and decreed that the complainant is entitled to have and recover the profits which have been diverted from him by reason of said infringement upon his rights, as aforesaid, and by reason of the sales of bluing made by respondent in imitation of said complainant's goods; and to enable the court to ascertain the said profits to which the complainant is entitled, it is ordered that this cause be, and the same is, hereby referred to G. Morris Bond, Esq., one of the commissioners of this court, with directions to state an account thereof, from the proceedings and proofs now in the cause, and such other proof as may be laid before him.

"VI. And it is further adjudged, ordered, and decreed that the said respondent, James G. Horn, pay the costs of these proceedings."

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668. Thorley's Cattle Food Co. *v.* Massam.

1880. *English Ct. App.* — 42 *L. T. Rep. N. S.* 851.

THE facts proved in evidence were briefly these:

Joseph Thorley, the original maker of the cattle food, died

in 1876, having by his will directed that his business should be carried on by his executors, with the assistance of his son Joseph Thorley.

J. W. Thorley, whose name was given to the plaintiff company, was a brother of the late Joseph Thorley, and both brothers were equally acquainted with the secret for compounding the cattle food, which they had obtained from a person named Fawcett. J. W. Thorley had at one time been in the employ of his brother, and being acquainted with the business, he was, on the death of Joseph Thorley, induced to join in getting up a company, which was registered, with a capital of £200, divided into 4,000 shares of 1*s.* each, J. W. Thorley having signed the memorandum of association as the holder of one share.

In the action of *J. W. Thorley's Cattle Food Company* v. *Massam*, witnesses were examined on both sides upon the question whether the article sold by the defendants was the same as that manufactured by the plaintiffs. Among the witnesses for the plaintiffs were several well-known analytical chemists. The effect of their evidence was that, although the analysis they had made differed in some unimportant items from that of the defendants, the variation was so slight that the two articles, for all purposes of food, were essentially the same. The differences might be traced to the variation in the quality of the ingredients used. On the other side, the evidence went to show that there was an ascertainable difference between the two compounds, and that as the defendants' mixture contained more spice and more sugar, it was likely to be more palatable to the cattle than the plaintiffs' mixture; but it was admitted that if the two mixtures were placed before a cow in the same manger, she would, in all probability, be unable to distinguish the difference, and would eat them both. In the second action, by the executors against the company, witnesses were examined upon the question whether or not the travellers sent round the country by the company had or had not represented to the purchasers, or led them to believe, that J. W. Thorley & Co. were the succes-

sors to the business formerly carried on by Joseph Thorley, deceased, and that they were, in fact, carrying on that business.

The company had issued an almanac in which appeared a report and analysis by Dr. Hassall of "Thorley's Food for Cattle," which had been made at the request of Joseph Thorley, and on the article made by him; and a list of the prizes obtained for cattle through the use of "Thorley's Food for Cattle;" though in fact the condiment had been that supplied by Joseph Thorley.

There was also in the almanac the following statement: "The executors have continued to manufacture some food and sell it under the name of 'Joseph Thorley,' which they have registered as their trade-mark. The public may by this ruse be induced to imagine that Mr. Joseph Thorley is still living and manufacturing the cattle food which is being sold by his executors, whereas the only surviving Mr. Thorley (Mr. J. W. Thorley) has no connection whatever with the persons trading under the name of the late Joseph Thorley."

The packets in which the article sold by the company was made up were of the same shape and size, and wrapped in the same colored paper, as those used by Joseph Thorley and by his executors, and bore the same directions for use. But it was stated that the company sent out their packets in boxes of a different shape and size from those used by Thorley and his executors.

Malins, V. C., came to the conclusion upon the evidence, that the two articles sold by the executors and the company respectively were substantially the same, and in *J. W. Thorley's Cattle Food Company* v. *Massam* he restrained the executors from issuing advertisements injuring the company in their trade by representing in effect that the cattle food sold by the company was spurious. He dismissed the action of *Massam* v. *J. W. Thorley's Cattle Food Company*, being of opinion that there was not sufficient evidence adduced by the plaintiffs, on whom the burden of proof lay, to show that the

company represented that they were the successors, or were carrying on the business, of Joseph Thorley.[1]

The executors appealed from both decisions.

James, L. J. "In the first case we came to a decision really, practically, and substantially, without hearing the respondents, the moment we had the two documents read to us, one of them throwing a light upon the other. We thought that the executors, the defendants in that action, had said more than they ought to have said. They might have given warning by saying that the company were not carrying on their business, and were different from them, and they might have said that they were not successors of Joseph Thorley; but they went on to make allegations which were really allegations imputing to them that they were foisting a bad article upon the public, and so on, stating in substance that it was a fictitious article, and an article calculated to do mischief. We thought Mr. Glasse had not proved his justification of that libel. There was a libel if not justified; and having our attention called to the evidence, we thought the executors had failed to prove that there was any foundation in point of fact for the assertion that the company were foisting an article as something they were not entitled to represent it, that is, independently of what I may call the trade name or trade-mark. Now in the other case, which is probably the more important one, I am of opinion that the executors, the plaintiffs in the action, ought to have succeeded, and ought therefore to succeed before us. In the first place I will dispose of this point which has been raised, that there is anything in the nature of an estoppel, or anything in the nature of a bar to the plaintiffs' right to relief on any ground of this kind by reason of their having discontinued the former action of *Massam* v. *J. W. Thorley's Cattle Food Company*. The plaintiffs there failed to get an interlocutory injunction, and having failed to do that they discontinued the action, and paid the costs. That is not a *res judicata* which can be pleaded or dealt with as *res judicata*. All that amounts to is, that the vice chancellor did not then think a case had been made out for the interference of the court upon interlocutory application. No doubt the vice chancellor gave reasons in his judgment, which reasons he has also repeated in the present case, basing his decision principally upon a case of *James* v. *James*, 26 L. T. Rep. N. S. 568; L. Rep. 13 Eq.

[1] See the report, 41 L. T. R. N. S. 542.

421. Now I am of opinion that that application for an injunction ought to have succeeded, assuming the facts to have been, as we are told they were, substantially the same as the facts now before us, because I am clearly of opinion that the defendant company never had a right to use the term 'Thorley's Food for Cattle.' The right to use that name depends, or may be supposed to depend, upon what was supposed to have been decided in *Burgess* v. *Burgess*, 3 De G., M. & G. 896, and afterward decided in *James* v. *James*. Now, *Burgess* v. *Burgess*, has really been very much misunderstood, if it has been understood to say that anybody can always use his own name as a description of an article, whatever may be the consequence of it, or whatever may be the motive for doing it, or whatever may be the result of it. No doubt, Knight Bruce, L. J., made a very epigrammatic judgment, which probably has therefore caused it to be recollected more than that of Turner, L. J., who followed him. Knight Bruce, L. J., in his judgment, said: 'All the queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the queen's subjects have a right to sell these articles in their own names, and not the less so that they bear the same name as their fathers; nor is there anything else that this defendant has done in question before us.' Then he goes on: 'He carries on business under his own name, and sells his essence of anchovies as "Burgess's Essence of Anchovies," which, in truth, it is. If any circumstance of fraud now material had accompanied, and were continuing to accompany the case, it would stand very differently, but the whole case lies in what I have stated.' But the way in which Turner, L. J., puts it is this, which I take to be much more accurate: 'I concur in the opinion that this motion should be refused with costs. No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another. Where a person is selling goods under a particular name, and another person not having that name is using it, it may be presumed that he so uses it to represent the goods so sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there

is false representation or not.' That I take to be the accurate description of the law which was really adopted by the House of Lords, which now, of course, has settled the law paramount to all the cases before it in that case of *Wotherspoon* v. *Currie*, L. Rep. 5 H. of L. 508, in which the House of Lords differed from the view that I originally took in that case. I thought myself bound, in *Wotherspoon* v. *Currie*, to apply what I thought was the rule of law as laid down in *Burgess* v. *Burgess*, and some other cases which seemed to have followed it, that a man had a right to use a name if he was not telling that which was untrue on the face of it. But the House of Lords came to the conclusion that there were things which were marks of fraud in that case. The words used were, 'Currie & Co., starch and corn flour manufacturers, Glenfield.' Now the name of the starch of the plaintiff was 'Glenfield Starch,' and the defendant was actually manufacturing starch at Glenfield for the purpose of enabling him to say that he was manufacturing it at Glenfield. There could be no doubt about that; and the House of Lords said the mere fact that he was really carrying on the manufacture at Glenfield, and was not therefore telling a lie in that respect, did not exempt him from the consequences of this, that the whole thing was intended and calculated to produce on the mind of the purchasers the belief that his article was the article of the plaintiffs. Lord Westbury sums it up in a few words: 'I take it to be clear from the evidence that long antecedent to the operations of the respondent the word "Glenfield" had acquired a secondary signification or meaning in connection with a particular manufacture. In short, it had become the trade denomination of the starch made by the appellant. It was wholly taken out of its ordinary meaning, and in connection with starch had acquired that peculiar secondary signification to which I have referred. The word "Glenfield," therefore, as a denomination of starch, had become the property of the appellant. It was his right and title in connection with the starch. Now the question is, has that property been invaded by the respondent? and I take the whole proceedings of the respondent from beginning to end to have been nothing in the world more than a contrivance for getting the word "Glenfield" associated with his manufacture. If that be true, what the respondent has done has been done *malo animo* with a view of possessing himself of a denomination which was the property of the appellant.' I should like to say a few words on that case of *James* v. *James*, which the vice chan-

cellor in this case considered himself bound by. There may be a distinction, which I am going to point out, between that case and this; but if they be practically the same, which I am bound to say I think they are, for myself, I cannot concur in the decision in *James* v. *James*, nor in the reasoning which led to it, nor in the distinctions which were attempted to be taken. Now in *James* v. *James*, a Lieut. James had invented a thing called a horse-blister — 'Lieut. James's Horse-blister.' It was manufactured by himself, and he conveyed it to persons upon trust for some members of his family. Another person of the name of James, a member of the family, then made it after the death of Lieut. James, and sold it under the same name. Now Lord Romilly, M. R., was of opinion that although during the life-time of Lieut. James that could not be done, it could be done after his death. I am utterly unable to perceive any ground for that distinction. If Lieut. James had the trade-mark, or what was equivalent to a trade-mark, during his life; if Lieut. James had the right to prevent anybody of the name of James or otherwise from selling 'Lieut. James's horse-blister,' I cannot conceive how that right was not transmitted to his legal personal representatives, or why his legal personal representatives had not the same right as Lieut. James had to enforce that which was his right of property, to use Lord Westbury's expression, in connection with the manufacture of a horse-blister. It is possible that in that case the master of the rolls may have thought that 'Lieut. James's horse-blister' being a mere recipe, anybody who had got the recipe might go and get it made up by any chemist or druggist, and therefore that 'Lieut. James's horse-blister' was merely an indication that it was made according to Lieut. James's recipe, which I am bound to say I am unable to concur in; still there might be that distinction that there the recipe was the whole thing. Now I cannot apply that to a case like the present, where two people could make the article in question from the same recipe, and yet make articles as dissimilar as possible in point of quality. Of course, where we are dealing with an article of food, a condiment, the merit and the value of the article depends on the great care which the one man might or might not take in selecting the very best articles he was compounding together, and in the manipulation of the articles, and the preservation of them during the course of manufacture. But I do not think that there really is any substantial difference between the two cases. What, as it appears to me, was in the mind of the

master of the rolls at the time, and what led to the fallacy, was this: there is no doubt that if a man takes out a patent for a thing, and the thing is known as his patent, for instance, say 'Flavell's Patent Kitchener,' and the patent expires, if the patent was known as the plaintiff's patent, then anybody else might make the thing as 'Flavell's Patent Kitchener,' because Flavell's kitchener then does not mean made by Flavell, but made according to Flavell's patent. What have we got in this case? In the first place, the thing here was not invented by any Thorley at all, and therefore 'Thorley's Food' cannot signify a food made according to Thorley's invention. The invention is said to be by somebody else, whose recipe is said to have been purchased by the original Thorley, and 'Thorley's Food for Cattle' here, according to my view, does not mean food consisting of particular ingredients, or made up according to a particular recipe, because no purchaser would care about that; but 'Thorley's Food for Cattle' meant that food which for many years was manufactured at works belonging to Joseph Thorley, and afterward was manufactured by his executors carrying on his business at the same works. The words 'Thorley's Food for Cattle' would indicate, according to my view of the case, to a purchaser, this: You have always had a very good article called 'Thorley's Food for Cattle;' any article bearing that name is to you a guarantee that it comes from the same place from which that has come with which you have hitherto been well satisfied and content. That in truth is the meaning and object and result of a trade-mark. That is what a trade-mark is; it does not signify what it is — whether it is a name, or a symbol, or a fancy name, or anything else. It indicates this, a warranty that the article to which it is attached has come from the particular manufacturer of the goods with which buyers have been hitherto pleased. 'Thorley's Food for Cattle' never became an article of commerce as distinguished from the particular manufactory from which it had proceeded. I referred in the course of the argument to a case as an illustration which was the converse of this, the case of *Liebig's Extract of Meat Company*, where the company wanted to prevent some defendants from selling Liebig's extract of meat, or selling anything of that name, the company having got Liebig to assist them and lend them his name. The answer to that was: Liebig's extract of meat has ceased to be a thing made by Liebig, because Liebig has published to the world the mode by which it is made, and it has been made and manufactured generally,

and has got into the Pharmacopœia, into books of cookery, into a dozen places where a dozen people can make it, and has now become as much known as if it were called 'Extract of Meat' alone, or anything else, and Liebig's extract has ceased to have any connection with Liebig as the maker of it for the purpose of the manufacturer, and was merely the description of it as the article known to the medical world and other persons who had occasion to use it. That was the converse of this case. There is nothing like that in this case of 'Thorley's Food for Cattle.' Then we have to consider what was the *animus*. It appears to me that that would be almost sufficient to dispose of it; but there is one thing that struck me in this all through. We have had nothing like a satisfactory explanation of how J. W. Thorley's Company came into existence; how they came to form themselves into a company, unless it was that they thought that Thorley was making a very good thing; that they thought that Thorley's food was a very profitable thing; that it had got a very great reputation, and that some of them would like to steal the reputation which Thorley's article had acquired. In order to do that, they seem to have somehow or other got into communication with a gentleman who was a relation of the late Joseph Thorley, and a connection of his executors, and who for some years had been in the service of Joseph Thorley, and during those years, according to his own account, which I take to be true, had acquired a knowledge of the recipe, and had acquired the exact knowledge of the manufacture, but who for several years previous to the existence of this company had never had anything to do with the manufacture of food for cattle, but was probably gaining his livelihood in some other way; but having the same name of Thorley, which was the distinguishing mark of food for cattle, he either tendered himself for sale, or was found for purchase by some person, in order that his name might be got into a joint-stock company limited, for the sake of selling these goods. Why was that name got in there except for the purpose of inducing the world to believe that it was the same concern, or that it was *the* Thorley, that it was the same Thorley whose name was the principal characteristic of the name of the article? The name of the company, I cannot help observing, was J. W. Thorley & Co., Limited, and that J. W. Thorley & Co., Limited, is, to my mind, to begin with, a fiction, an intentional fiction. The meaning of J. W. Thorley & Co., Limited, that which it would convey to any person's mind, is that there was a part-

nership of J. W. Thorley & Co.; a real partnership, which had been carrying on business in the manufacture of this food for cattle, and that for some reason or other, such as we have seen constantly in our experience in this court, the partnership had been minded to convert itself into a limited company for the more convenient transaction of its business. But here the J. W. Thorley was not a partner. J. W. Thorley was employed as an agent, as the manager; and J. W. Thorley's only connection with the company, *quâ* company, is that he had a one shilling share in it, the company itself having a capital of £200, or something of that kind. To my mind that really would be exactly the same thing as if somebody were to establish a brewery at Burton, finding some one of the name of Bass, or somebody who would take the name of Bass — because there is no law to prevent a man assuming any name he likes — and then calling themselves J. Bass & Co., Limited, or W. Bass & Co., Limited, and advertising Bass & Co.'s pale ale. I really can see no distinction between Bass & Co.'s pale ale as advertised by such a company got up in that way, and 'Thorley's Food for Cattle,' advertised by the company which has procured a person of the name of Thorley to be connected with their company. That of itself, to my mind, is a very strong thing to begin with. And then next we have to look at the advertisements and circulars, and the almanac. First of all, as to the packages, could anything be more calculated to deceive? Those are the things by which the company really influenced customers. It is said by the defendants that they are very careful, and they have always been very careful, to avoid anything which could be considered as indications of any intention on their part to pass their goods off as the others'. If they had been so very much minded in that way, why did they not make their packages different — the same shape and the same size it might be, because it might be convenient; but why did they not put them in a scarlet, blue, or orange and blue wrapper, or something that would have immediately shown not only to a person minutely comparing the things together, but to any person who was in the habit of having the things in an orange packet, that it was a blue packet? Why did they not do that, if they were minded, as they say they were, not only to take care that their things should not be mistaken, but that the world should know that they were rival manufacturers? Then there is the almanac which they have circulated, and in which they put things which were paid for by Thorley — Dr. Hassall's description and re-

port, and things of that kind, and other passages — for the purpose of implying that they were the persons for whom Dr. Hassall's report had been obtained, and that Dr. Hassall's report was a report on their manufacture. Then there is this again: they put, 'It is the best cattle food in the world. Upward of £95,000 has been awarded to horses and cattle fed on Thorley's food for cattle. It has gained the diplomas from the Pennsylvania State Agricultural Society and of the Royal Agricultural Society,' and so on, all of which was true of the article which was manufactured by Joseph Thorley, but was not true of the article which was manufactured by them; that is to say, their article had not received any of these things. They may say their article is the same, or as good, but in my opinion the representation is not, 'We are making an article as good or the same as Thorley's, which gained the prize,' but 'This is the thing, we are the persons who are selling the thing, the produce of the manufactory, which has obtained those prizes.' There are other things which I need not stop to dilate upon. On the parol evidence I am satisfied, and I agree very much with what Mr. Townsend said, with regard to the witness Stillwell, who was a traveller for the company, and who went to people and said, 'I come from Thorley's; Joseph Thorley is dead; the persons I represent are carrying on the business.' I have not the slightest doubt that, being well warned that he was not to say anything which could be construed into a positive assertion that the company were carrying on the same business at the same premises, or were the successors in business, he took care to say that they were carrying on the business of manufacturing food for cattle. It might be said, it was true that they were carrying on the food for cattle business; but the intention and the effect of that, in my mind, was to cause a belief to be entertained by the persons to whom it was addressed, who all say they did form that belief from it, that it was the same concern; that the company were carrying on the same manufactory from which the things used to be distributed to the world. I am therefore of opinion that in this case, what the defendant company have done has been calculated to deceive, and I am bound to say in my judgment I have no doubt was from the first intended to deceive, the persons purchasing their article, into the belief that they were purchasing the article which Joseph Thorley had formerly manufactured at the works which had obtained the great reputation which Thorley's manufacture appears to

have obtained from the purchasers of those condiments. I am of opinion that the order should have been granted very much in the general words in which it was asked."

Baggallay and Bramwell, L. JJ., concurred.

669. Carroll *v.* Ertheiler.

1880. *C. C. U. S. E. Dist. Penn. Not reported.*

PLAINTIFF'S bill set out the adoption of the arbitrary words "*Lone Jack*" to denote a special brand of tobacco manufactured and sold by him. It further alleged that after the plaintiff's tobacco had become well known to the public under the name "*Lone Jack*," defendant manufactured and put into the market smoking tobacco in the shape of cigarettes, under the name or symbol of "*Lone Jack Cigarettes.*" The device or figure used by defendant was different from that used by the plaintiff, and defendant's name was conspicuously applied.

On motion for preliminary injunction, *Held*, that defendant should be restrained from using the words "*Lone Jack*" during the pendency of the suit.

Per Butler, J. "The defendant rests upon a denial, first, that the defendant has used the trade-mark; and second, that he has used it as a designation of 'smoking tobacco.'

"The second branch may, most conveniently, be noticed first. While the revenue laws, for purposes of taxation, distinguished between smoking tobacco and cigarettes, there is, we believe, no substantial difference. Cigarettes consist of smoking tobacco similar in all material respects to that used in pipes. The circumstance that a longer 'cut' than that commonly used in pipes is most convenient for cigarettes is not important; nor that the tobacco is smoked in paper instead of pipes. It may all be used for either purpose; and is all embraced in the term 'smoking tobacco.' We do not believe the public or the trade draws such a distinction as the defendant sets up. We have not overlooked the statements contained in his affidavits. But the method pursued in obtaining this testimony, generally, does not recommend it to our confidence. The affidavits seem to have been prepared without seeing the witnesses, and sent over the country to be signed by those who might be found willing to sign them. They

are, generally, similar in language, and printed. This method of obtaining testimony is not worthy of encouragement. If the public and trade draw such a distinction, and, therefore, do not suppose the defendant's cigarettes to be made of the plaintiff's tobacco (and the defendant so understands), why does he adopt the designation by which this tobacco is familiarly known, and persist in using it?

"The dominating characteristic of the plaintiff's trade-mark is the name, 'Lone Jack.' His tobacco has come to be known and described by this name throughout the country, to such an extent that the accompanying device has ceased to be important, if it ever was so — doubtless rarely observed, and slightly remembered. At home and abroad, to the trade and the public, it is familiarly known as 'Lone Jack;' and is thus designated as the plaintiff's manufacture, by purchasers and sellers.

"The defendant's application of this name to his smoking tobacco is an adoption and use of the essential part of the plaintiff's trade-mark. Surrounding it with a different device signifies nothing to the public — who attach no importance to the device of the plaintiff. The defendant's name upon the cigarettes, if recognized (and it would not be without close inspection), would not inform the public that the tobacco is not of the plaintiff's manufacture."

670. Connell *v.* Reed.

1880. *S. C. Mass. Rep.*

A BILL in equity was brought to restrain the defendants from infringing an exclusive right claimed by the plaintiff in the words "*East Indian*," used with the word "*remedy*" or "*remedies*" as a trade-mark upon bottles of medicine. It appeared that the plaintiff adopted these words to denote and to indicate to the public that the medicines were used in the East Indies and that the formula for them was prepared there, neither of which was the fact. *Held*, that to maintain the bill under these circumstances would be to lend the aid of the court to a scheme to defraud the public.

Per Gray, C. J. "Although the master reports that there was no evidence that any other person than the plaintiffs or their agents had ever used these words in connection with the manufacture and sale of

medicines, it is at least doubtful whether words in common use as designating a vast region of country and its products can be appropriated by any one as his exclusive trade-mark, separately from his own or some other name in which he has a peculiar right. But the conclusive answer to this suit is that the master has found, upon evidence which appears to us to be satisfactory, that the plaintiffs have adopted and used these words to denote, and to indicate to the public, that the medicines were used in the East Indies, and that the formula for them was obtained there, neither of which was the fact. Under these circumstances, to maintain this bill would be to lend the aid of this court to a scheme to defraud the public."

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671. Royal Baking Powder Co. *v.* McQuade et al.

1880. *C. C. U. S. Not yet reported.*

COMPLAINANT had used and acquired a right of property in the word "*Royal*" as a trade-mark for baking powder; defendants, long after complainant's goods had acquired celebrity in the market, made use of the word "*Loyal*" upon the same class of goods and simulated complainant's label.

On motion for preliminary injunction, *Held*, that the word "*Royal*" was a good trade-mark, and that the use by defendants of the word "*Loyal*" should be enjoined *pendente lite*.

Per Blodgett, J. "I think that it is very manifest there was an intention on the part of the manufacturer of this, the defendants' powder, to obtain the benefit of whatever labor and effort the complainant has used to give reputation and character to his goods. There is the adoption, in the first place, of a word which is substantially *idem sonans* with the word 'Royal.' The words are not, of course, precisely the same, but when rapidly spoken by people not accustomed to notice the nice distinctions of speech, they might be taken for the same word. There is also the adoption of a label which in colors, in its design, and collocation of the letters, and even of the vignette, and in all the characters which strike the eye, is so identical with that of the plaintiff, that it confirms the impression which would be created by the use of the general name, or generic term, that there was an intention on the part of the manufacturer of defendants' goods to avail himself of the reputation of the plaintiff. It is true that the

defendants have announced on the face of their label that this is not the 'Royal,' but that is in a place where it would perhaps be the last thing that would be read, and that after the goods had been obtained and paid for, and it is after all a reservation which would avail the defendants nothing. It is an explanation which comes too late in the transaction to really exculpate the defendants. The make-up generally of the package is so similar, and the imitation of the name is so similar, as to create naturally, and be calculated to create, the impression upon people who are not particular in reference to terms, that they were buying the 'Royal' when they were buying the 'Loyal.' The class of persons who would naturally be sent to a grocery store to buy this class of goods would be such as might be imposed upon readily by the similarity of these two names."

672. Singer Manufacturing Co. *v.* Brill.

1880. *Superior Court of Cincinnati. Not yet reported.*

THIS was an action, under the code of the State of Ohio, for an injunction and an account. Three causes of action were recited. Plaintiff alleged that it was a corporation engaged in the manufacture and sale of sewing-machines, which machines were known (1.) by the name or designation "SINGER," and (2.) by their appearance; that defendant had violated its rights by selling sewing-machines of similar appearance, under the name of "ENGLISH SINGER SEWING-MACHINES."

The evidence tended to show that the defendant had never actually attached the word "*Singer*" to his machines, and that he had never directly represented in any way that they were made by the plaintiff.

The court (Foraker, J.) said: "There are but three general questions presented. The first is: whether or not the word '*Singer*,' as it has been used by the plaintiff and its predecessors, denotes the manufacturer, or is a word of description only.

"The second question is, as to whether or not, assuming that the plaintiff has trade-mark or trade name rights in the use of the name Singer, the defendant has infringed them.

"The third is, as to the right of the plaintiff to enjoin the defendant

from dealing in machines made in imitation, as to the form, appearance, ornamentation, etc., of the plaintiff's machines.

"The first of these questions is a question of fact to be determined from the evidence."

After examining the question at great length the court concludes:

"From these considerations, united with the direct evidence offered by the plaintiff in support of its claim that its machines are not manufactured according to any one system, pattern, or principle; and that the word Singer was always used by it and its predecessors to designate that they were the manufacturers, I come, as I have said, without hesitation, to the conclusion that the decided weight of the evidence is with the plaintiff on this question.

"In this review of the evidence I have omitted to make mention of many things confirmatory of this conclusion, because it is a matter of great tediousness to refer to all, and I deem it sufficient to name only enough to show the ground upon which my conclusion rests.

"If I were to refer to any other, however, it would be to the fact established by all the witnesses in the case, those for the defendant as well as those for the plaintiff, that if an order were to be received simply calling for a Singer machine, it could not be filled until there had been an explanation specifying what kind of a machine was wanted. This seems to have been regarded as a vital point on this branch of the English cases that have been referred to. And justly so, since it shows that by the word Singer can not be meant any particular machine or kind of machine."

Concerning the second point, after referring to certain similarities of little importance, his honor writes:

"The word 'Singer' nowhere appears upon the machines sold by the defendant, but in all his cards, circulars, and newspaper advertisements he represents them to be 'English Singer Sewing-Machines, manufactured by the Williams Manufacturing Company, at Montreal, Canada.' . . . . Can there be infringement of a trade name by merely advertising an article by the name . . . . without selling or offering it with the name attached.

"However it may be in the case of a trade-mark, as distinguished from a trade name, I am satisfied both upon reason and authority that there may be infringement in that way of a trade name.

"I don't know how I can better show this authority and the reason

of it than by quoting from the opinion of the Lord Chancellor in the case against Wilson, 3 App. Cases L. R. 389, where he says, speaking upon this point:

"'My Lords, I am unable to see that this makes any difference in point of principle. It may well be that if an imitated trade-mark is attached to the article manufactured, there will, from that circumstance, be the certainty that it will pass into every hand into which the article passes, and be thus a continuing and ever-present representation with regard to it; but a representation made by advertisements that the articles sold at a particular shop are articles manufactured by A. B. (if that is the legitimate effect of the advertisements, which is a separate question) must, in my opinion, be as imperious in principle, and may possibly be quite as injurious in operation, as the same representation made upon the articles themselves.'

"The next question here presented is that suggested by the parenthetical sentence of the Lord Chancellor, as above quoted, viz.: What is the effect of the advertisements made by the defendant?

"It is earnestly insisted by him that his advertisements and representations are of such a character as to preclude all possibility of deception; that every one reading them is thereby apprised distinctly and plainly that the machines dealt in by him are not the machines made by plaintiff; and it is claimed that this was especially intended to be made to appear in order that defendant might have the benefit of the superiority which he claims for his machines.

"There is no question but that it does appear from defendant's advertisements that the plaintiff is not the maker of them, and that his machines are called 'English Singers,' and there is no question either but that, to one informed, these statements would be sufficient to impart all that is claimed.

"But we must remember the fact, common to the knowledge of all, that the great mass of people likely to buy and use these machines are not so informed. The most that such persons know is that the machines called Singer Machines are what they want, and consequently, when they find the word Singer they are not apt to stop and read what accompanies it; but whether they are or not, the fact that they must do so to avoid being misled is sufficient. The defendant has no right to put them to that trouble or the plaintiff to that risk.

"But again, if such advertisements do not deceive, if they are not intended to deceive, as defendant claims, why should they be made? If

defendant wants to distinguish his machines from the plaintiff's why use a word that can have no other effect than to make an explanation necessary? It would seem easier for the defendant to guard and protect the reputation of his machine against what he claims to be the inferior machine of the plaintiff if he avoided the use of the word altogether. But however this may be, the authorities are, without exception, that such use of the word Singer by the defendant, as he is shown to be making, is an infringement upon the rights of the plaintiff in its use as a trade name, assuming, as I have found, that the plaintiff has such rights."

The plaintiff's contention, that it had a right of property in the "form, appearance, and ornamentation" of its machine, and that this right had been infringed by the defendant, was also sustained.

The injunction restrained defendant from using the name "*Singer*," either alone or in combination with other words, in advertisements of his machine, and from selling sewing-machines having the external appearance, shape, or ornamentation of the machines of plaintiff's manufacture.

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673. Lawrence Manufacturing Co. *v.* Lowell Hosiery Mills.

1880. *S. C. Mass.* — 10 *Rep.* 809.

PLAINTIFFS used as a trade-mark upon a certain grade of hosiery of their manufacture a certain device with the figures 523 under it; these goods were known and called for as "523's." The defendants afterwards used as a trade-mark upon goods of their manufacture a device somewhat resembling that of the plaintiffs' and the figures 523 printed in the same kind of type, and placed as to the other parts of the device in the same relative position as the plaintiffs'.

Held, that the plaintiffs had established their right to the exclusive use of their device; that the numerals 523 were an essential part thereof; that the defendants had violated the plaintiffs' right by the use of an imitation of said trade-mark, and had thereby deceived the public and injured the plaintiffs; and that the plaintiffs were entitled to the relief prayed for in their bill.

Per Colt, J. "The statutes of this commonwealth protect a person who uses any peculiar name, letters, marks, device, or figures upon an article manufactured or sold by him, to distinguish it as an article manufactured by him. Gen. Stat. c. 56, § 1.

"It is said that there can be no exclusive right to use marks, figures, or letters which are intended merely to indicate the quality of the fabric manufactured, as distinguished from those marks which are intended to indicate its origin, because one has no right to appropriate a sign, or symbol, or mark which, from the nature of the fact it is used to signify, others may use with equal truth, and therefore have an equal right to employ for the same purpose. . . . . And in *Canal Company* v. *Clark*, ... (327,) it was declared by Strong, J., that no one can claim protection for the exclusive use of a mark which would practically give him a monopoly in the sale of any goods other than those of his own manufacture. . . . . Letters and figures when used only for the purpose of denoting quality are, from the very nature of the use, incapable of exclusive appropriation. These considerations would be decisive, if the plaintiffs here claimed the exclusive right to the numerals '523' when used only to indicate the quality and not with reference to the origin of the goods. But such is not the plaintiffs' position. Their claim is, that the purpose of using those figures in connection with the other parts of their trade-mark was to aid the buyer in distinguishing their goods from similar goods made and sold by others.

"A trade-mark when applied to manufactured articles may well consist of the name and address of the manufacturer, with the addition of some peculiar device or curious figure, so disposed as to attract attention, and advertise more effectually the origin of the article to which it is attached. And it may be that mere numerals, or letters of the alphabet, can be combined and printed in such unusual and peculiar forms that the result would be quite sufficient for use as a trade-mark. In *Boardman* v. *Meriden Britannia Co.* . . . (302) it was said that if numbers were once shown to have been used for the purpose of indicating origin or ownership, and to have had that effect, it would not be easy to assign a reason why they should not receive the same protection as trade-marks. The numbers in that case, however, were held, by virtue of their connection, to form an important part of the trade-mark itself.

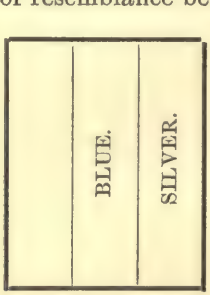
"It is not necessary that the resemblance produced should be such as

would mislead an expert, or such as would not be easily detected if the original and the spurious were seen together. It is enough that such similitude exists as would mislead an ordinary purchaser."

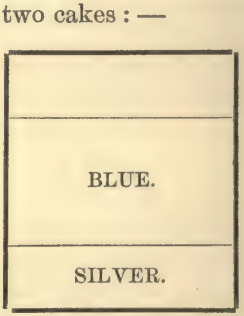
674. Morgan Sons Co. *v.* Troxell et al.

1880. *Supreme Court of New York, General Term: before Davis, C. J., and Brady and Barrett, JJ. Not yet reported.*

COMPLAINANT manufactured a scouring soap, which it put up in silver foil paper with a blue band, the band being carried around the cake lengthwise; the defendants put up a similar article in silver foil paper with a blue band which was passed around the sides of the cake. Defendants' band was broader than complainants', and their cake somewhat different in size and shape; the color of the paper and brands were substantially the same. The following cuts illustrate the points of resemblance between the two cakes: —



Complainants' Cake.



Defendants' Cake.

The words upon the bands, which were employed as labels, were entirely different. *Held*, that complainants' rights had been violated, and that it was entitled to an injunction.

Per Barrett, J. "My impressions upon the argument of this case were that the referee had gone too far. There seemed to be considerable dissimilarity between the respective packages of 'Sapolio' and 'Pride of the Kitchen' submitted for our examination. It did not appear probable that any person of intelligence could, even upon a casual inspection, mistake the one for the other. Upon the one,

'Enoch Morgan's Sons' Sapolio,' printed in gilt letters, met the eye; upon the other, 'Troxell's Pride of the Kitchen Soap.' Indeed, the principal similarity, aside from the form and size of the cake, was the wrapper of tinfoil paper encircled by a band of ultramarine blue. The further question suggested itself to my mind, Could the plaintiffs appropriate this peculiar combination of tinfoil paper with an ultramarine blue wrapper and gilt letters printed thereon, and by applying it to scouring soap secure a trade-mark therein? A careful examination of the evidence and further reflection have removed these impressions, and led me to the conclusion that the learned referee's judgment was not only just, but sound in law. Whatever there is of dissimilarity in the two articles is but seeming. While there is an almost ostentatious display of variation in matters not likely to attract the attention of the casual purchaser, there is substantial similarity in the picture to which the eye has become accustomed. In this connection, we must not lose sight of the character of the article, the use to which it is put, the kind of people who ask for it, and the manner in which it is ordered. Very broad scene-painting will deceive an ignorant, thoughtless, or credulous domestic, looking for an article in common and daily use, and of no particular interest to her personally. The same kind of deception would be instantly detected by an intelligent woman of the world looking for her favorite perfume, soap, or dentifrice, or by a man of luxurious tastes inquiring for some special brand of champagne. Now, the evidence in the case is clear and abundant that the 'Pride of the Kitchen' was sold by many grocers as 'Sapolio,' and that many housekeepers were actually deceived. Nor can there be any doubt (we regret to say) that the 'Pride of the Kitchen' was delivered by the defendants to these grocers with the intent that it should be sold as 'Sapolio.' It was thus the defendants' purpose to take advantage of the market secured by the industry of the plaintiffs and their predecessors, and by a large expenditure of time and money. They thus determined, by selling their goods as the goods of the plaintiffs, to build up a business in scouring soap upon their neighbors' labor and capital. It would be a reproach to the administration of justice if the execution of this purpose could not be checked.

"It is said that the plaintiffs cannot monopolize the use of tinfoil nor of blue paper. This is quite true, but it does not meet the question. The plaintiffs do not seek to monopolize tinfoil nor blue paper.

Any one may use these articles, and use them freely. They may be applied to any other soap. They may even be applied to scouring soap. All that the plaintiffs ask is that they shall not be applied to scouring soap in such form and manner, with such peculiar relations to each other and to the cake, as to deceive that special public which relies upon similar methods long since adopted by the plaintiffs and their predecessors.

"A trade-mark is not necessarily limited to a device or name. Nor are we prepared to admit that a party cannot be protected in the combined arrangement of form and distribution of color, with which his goods are put up and placed before the public, especially where there is a fraudulent purpose, and where customers have, in fact, been deceived. If the plaintiffs cannot be protected in a '. . . . pressed and stamped cake enclosed in a tinfoil wrapper, encircled with an ultramarine blue band, printed in gold,' neither can they, though other and still more novel, distinctive, and striking forms and colors be added. There might be double and treble bands of various colors and sizes, crossing each other in different places, with the margins cut or stamped in different shapes and styles. Yet, if the defendants' contention be well founded, the plaintiffs could not be protected against their fraudulent reproduction. According to this doctrine, it is only necessary for the dishonest trader to avoid the use of some special word or device, to which the *technical name* trade-mark has been given, and to gain his piratical end, by imitating everything which really conveys to the public belief in the genuineness of the article sought. It must have been this shallow, as well as unworthy idea, which was in Troxell's mind, when he declared his purpose of imitating 'Sapolio' as closely as possible, without absolutely making himself liable.

"The law of trade-marks has been gradually expanding so as to meet just such cases. The courts, in a long and unbroken line of decisions, have endeavored to uphold and enforce commercial morality, and have afforded their protection to honest enterprise and skill. It will not be necessary to go over these cases. They have, in fact, become too numerous for extended analysis. . . . . It will be sufficient to state the general result . . . . so far as may be applicable to the case at bar. We deem it, then, to be well settled upon authority, that to justify the interference by injunction of a court of equity, it is sufficient that there is a fraudulent intention of palming off the

defendant's goods as those of the plaintiff's, and that such intention is being carried into execution.

"*Caswell* v. *Davis* [289] is supposed, by the appellants, to conflict with this position, but we think without reason.

"All that was held in that case was, that there can be no trade-mark in words or phrases in common use, which merely denote the character, kind, quality, and composition of an article. Consequently, the name 'Ferro-Phosphorated Elixir of Calisaya Bark' could not be protected. But there was no suggestion that the defendant would have been permitted to palm off upon the public his own preparation of 'Ferro-Phosphorated Elixir of Calisaya Bark' as that of the plaintiffs, had the latter given their preparation any name exclusively indicative of origin or maker. If the plaintiffs there had called their medicine 'Caswell's Ferro-Phosphorated Elixir of Calisaya Bark,' or 'Caswelline,' the defendant certainly would not have been permitted to palm off his elixir as that thus characterized. Nor would he have been permitted, by the imitation of Caswell's labels, signs, marks, or other symbols, to effect the same purpose. The Caswell case simply applies to the well-known doctrine, that a trade-mark cannot consist of anything which merely denotes the name or quality of the article, and that, as was said by Judge Duer, in the Amoskeag case, 2 Sand. 609, 'it is not enough that the public may be misled, or has been misled. As already intimated, the resemblance must arise from the imitation or adoption of those words, marks, or signs, which the person first employing them had a right to appropriate, as indicating the true origin or ownership of the article or fabric to which they are attached.' It does not disturb the rule, that a trade-mark may consist of anything — marks, forms, symbols — which designates the true origin or ownership of the article. . . . .

"The true rule is well stated in the late English case of *Mitchell* v. *Henry* (43 Law Times N. S. 186). There the plaintiff's trade-mark consisted of 'a white selvage on each side of the piece, having a red and white mottled thread interwoven the full length of the selvage between the edge of the piece and the edge of the selvage.' The goods sold by the defendant had 'a black or very dark selvage, the plaintiff's being white or nearly so; and the defendant's had an interwoven thread made up in their goods, composed of red, white, and yellow strands placed at the edge of the piece between the piece and the selvage.' Upon that state of facts, Lord Justice James observed:

'The master of the rolls seems to me to have considered that when he had satisfied himself, on the examination of the things before him, that the twisted thread in the defendant's selvage was in a position different from that of the plaintiff's, and that the plaintiff's selvage could not be said to be white, then that determines the question. I am bound to say, that to me the question is not whether the selvage is white, but whether it was what the trade knew as white selvage — whether anybody connected with the trade could have any doubt whatever as to what was meant by white selvage. Then, it is not at all conclusive to my mind whether the position of the defendant is the same or different from the position of the plaintiffs. *It resolves itself into the old question, which has always been the question to be determined in these cases, "Are the defendants, not in words, but by acts, and by something on the face of the articles, representing their goods as being the goods of the plaintiffs?" That is to say, "Are they using something which is calculated to pass off their goods as the goods of the plaintiffs?"* ' . . . .

"The fact that the imitation is but partial cannot avail the defendants. The question is, whether such a general resemblance remains as is designed to mislead the public (the Amoskeag case), and of that, as we have seen, there can be no doubt. It all comes to this, that as was said in Perry *v.* Truefitt [73], 'a man is not to sell his goods under the pretence that they are the goods of another.' The law does not limit the form of the pretence; that depends upon the facts of each particular case. Here that element is clearly present, both in the picture presented to the public eye and in the facts disclosed by the witnesses. The fraud, for such it was, was long planned, and its execution proceeded by regular and steadily advancing steps. When it was found that bars of soap were unsatisfactory, a pressed and stamped cake was resorted to. Then we have the polished pan and the face reflected therein, with the variation of a monkey for a man. Then came the various colored bands, none of which were found to answer the fraudulent purpose, culminating at last in the plaintiff's ultramarine blue. What was done was done artfully, with a view to reach thoughtless and ignorant buyers, and yet to evade the law by an apparent exhibition of mere rivalry. It was also done srhewdly, by enlisting the retail grocers through the bait of reduced prices and increased profits, thus making allies of these men for the general diffusion of direct misrepresentation. It will not do to call this enter-

prise and energy, nor to stigmatize the demand for protection against such practices as an effort to limit legitimate competition and to promote monopoly.

"We find no error in the rulings of the learned referee upon any of the other questions presented, and we think that the judgment should therefore be affirmed, with costs."

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675. The Apollinaris Co. Limited *v.* Moore.

1880. *C. C. U. S. E. D. of Pa.: before Butler, J. Not reported.*

COMPLAINANT being the lessee of a certain mineral spring, known as the "Apollinaris Spring," brought suit for an injunction against the defendant, to restrain the use of the word "*Apollinaris*" in connection with the sale of water compounded by him.

It was contended on behalf of the defendant that complainant had no standing in a court of equity by reason of its having fraudulently sold the water as a natural water when it was in fact an artificial water.

Held, that it appeared from the evidence that the water came from the Apollinaris spring, and that the statement that it was a natural product was substantially true; that the complainant's rights had been infringed, and that an injunction should be issued.

INDEX.

NOTE.—The numbers refer to the numbers of the cases.

"A" PENS, 568.

ABANDONMENT

of trade-mark by dismissal of suit for injunction, 230.

not established by other persons having copied some details, 367.

by non-claim, 437.

by adoption of a new mark, 513, 628.

by disuse, 590.

injunction granted to restrain infringement after, 125.

"A. C. A." COTTON TICKINGS, 100.

ACCOUNT OF PROFITS

given, though persons other than the plaintiff interested in the mark, 196, 243.

though defendants ignorant even of the plaintiff's existence, 204.

only after the defendant was aware of the prior ownership, 213.

only in respect of goods actually sold, 333.

not given where plaintiff's user short, 234.

where defendant had acted *bonâ fide*, 235, 608.

where plaintiff had delayed, 244, 251, 384, 500, 580.

where sales small, 253.

ACQUIESCENCE

by owner of trade-mark in infringement, when gratuitous, is mere revocable license, 100, 137.

when it will authorize breach of injunction, 115.

can only be established where knowledge is proved, 638, 642.

held not to be established, 228.

by persons at a disadvantage is no defence, 455.

See DELAY.

ACQUISITION

of trade-mark by long user, 51, 459.

without long user, 215, 234, 325, 364, 456, 627, 629.

limited to a particular class of goods, 215, 223, 234, 257, 616.

ACQUISITION — *continued.*
of trade-mark from trustees for creditors, 222, 323, 575.
there must have been vendible goods in the market bearing the mark for, 140, 215, 223, 234, 264, 301, 339.
containing a false assertion is impossible, 223.
previously used by others, 276, 301.
on formation of a partnership, 222, 399, 408, 437, 502.
from a person who had already sold his right, not possible, 367, 502.
in gross not allowable, 447, 487, 492, 630.
except by previous maker of the goods, 492.
ACTION
on the case, 4, 40, 50, 59, 68, 72, 82, 103, 111, 125, 140, 338, 374.
fraud must be proved in, 2, 4, 72, 82, 140, 213, 338.
plaintiff in, must show that his mark was on vendible goods in the market, 140.
under 5 & 6 Will. IV. c. 83, s. 7, 167.
for damages occasioned by an order for spuriously marked goods, 194.
for discovery, 519.
manner of trial of, 644.
ADDRESS,
injunction granted to restrain imitation of, 443.
ADJECTIVES
indicative of quality cannot be appropriated, 85, 226.
See DESCRIPTIVE WORDS.
ADMINISTRATION
must be taken out to a deceased proprietor of a trade-mark before his next of kin can claim the mark, 4, 337.
ADVERTISEMENT,
deceptive, 18, 163, 248.
complicated label held not to be a trade-mark, but a mere, 223.
expense incurred in, gives no right of trade-mark, 264, 339.
a necessary preliminary to registration in England, 515.
" AEILYTON " WRITING FLUIDS, 510.
AGENT,
principal responsible for fraud of, 321.
acquires no personal right, 534, 554.
AGENT FOR " Mason & Brand's Essence of Beef," 534.
AGRICULTURAL
implements, marks on, 412.
preparations, marks on, 250, 364, 489, 554.
" AINSWORTH'S THREAD," 257.
" AKRON " CEMENT, 282.

ALE,
marks on. See BEER.
ALIENS,
infringement of trade-marks of, in England, 151, 152, 164, 171, 199, 200, 275.
America, 78, 79, 83, 84, 125, 251.
"ALLOA" WOOLLEN YARNS, 601.
"ALLSOPP'S ALES," 183.
ALMANACK,
wrapper of, 85.
See PUBLICATION.
ALTERNATIVE
trade-marks recognized in the United States, 394.
registered in the United States, 501, 544.
"AMERICAN GROCER, THE," 503.
"Sardines," 422.
"AMOSKEAG" COTTON CLOTHS, 314, 500.
"ANATOLIA" LIQUORICE, 234.
"ANCHOR BRAND"
bacon and hams, 645.
wire, 213.
"ANCHOR TUBE COMPANY, THE," 566.
"ANCHOVIES, BURGESS' ESSENCE OF," 117, 169, 170.
"ANGLO-PORTUGO OYSTERS," 625.
"ANGOSTURA BITTERS," 591.
ANNATTO,
marks on, 421, 602.
"ANNUAL, BEETON'S CHRISTMAS," 450.
"ANTIQUARIAN BOOK-STORE, THE," 336.
"APOLLINARIS WATER," 457, 465, 509, 675.
APPEAL
from an injunction restraining the use of a trade-mark, advanced, 346.
delay disentitling appellant on, 117.
"ARAMINGO CHECK" GOODS, 186.
ARMS AS TRADE-MARK. See CREST.
"ARMY AND NAVY COÖPERATIVE SOCIETY, THE," 640.
"AROMATIC BITTERS," 432, 591.
ARTICLES
of partnership, construction of. See PARTNERSHIP.
"ASHFORD LODGE," 631.
ASSETS,
good-will of attorney's practice is not, 46.
medical practice held to be to some extent, 102.
not to be, 588.

ASSETS — *continued.*
good-will of newspaper is, 3, 35.
partnership is, 16, 64, 70, 139, 176, 177, 185, 192, 202, 206, 210, 215, 248.
public house is, 6.
shop is, 3, 58.
of partnership, good-will of newspaper is, 173, 178.
trade-mark is, 80, 215, 337.
trade name is, 248.
ASSIGNMENT
of trade-mark, possibility of, depends on the circumstances, 222, 223, 521.
together with the good-will, 257, 279, 319, 331, 521, 580, 630.
on sale of good-will, without direct reference to it, 350, 354, 492.
places assignee in position of assignor, 138, 257, 279.
held that notice of must be incorporated with the mark, 263.
need not be incorporated with the mark, 279.
twice over by the same person not allowable, 367, 502.
does not give a right to use it on another class of goods, 502.
by assignee in bankruptcy, 222, 323, 575.
with limitations as to locality of user, 628.
of Cutlers' mark possible, where owned by a non-freeman, 222.
name of hotel, 467.
theatre, 524,
good-will is subject to duty within the Stamp Acts, 128.
ATTACHMENT
issued for contempt, 353.
ATTORNEY,
contract by, to retire from business and recommend clients, etc., enforced, 11.
specific performance of agreement by, for sale of practice, refused, 22.
good-will of practice of, not assets to be administered, 46.
See GOOD-WILL; PARTNERSHIP.
"ATWOOD'S VEGETABLE PHYSICAL JAUNDICE BITTERS," 628.
AUTHOR,
improper use of *nom de plume* of, restrained, 429.
See NAME.
"AYER'S CHERRY PECTORAL," 574.

BAGS,
marks on, 365.

BAILEES
of goods spuriously marked, 229, 239.
BAKING POWDERS,
marks on, 161, 182, 656, 671.
"BALM OF THOUSAND FLOWERS," 144, 145.
BANK NOTES,
spurious issue of, restrained, 197.
"BANK OF ENGLAND" SEALING-WAX, 593.
"BANK OF LONDON, THE," 140.
BANKRUPTCY,
good-will of newspaper passes as "goods and chattels" on, 12, 159.
trade-mark passes as "goods and chattels" on, 537.
transmission of good-will on, 69.
trade-marks on, 222, 323, 447.
sale of good-will on, 17, 69, 323.
by assignees in bankruptcy held not to deprive bankrupt of the right to use his own name, 575.
"BANKS & CO." 248.
BARREL,
special form of, no trade-mark, 373.
an important element in the trade-mark, 395.
hoops on, no trade-mark registrable in the U. S. 480.
"BASS' BEER," 310, 655.
BAZAAR DEALER AT CALCUTTA,
infringement of trade-mark by, 241.
"B. B. H." IRON, 215, 530, 540, 555.
"BEAVERINE" BOOTS, 375.
"BEDFORDSHIRE EXPRESS, THE," 317.
BEER,
marks on, 89, 183, 188, 261, 310, 431, 545, 617, 655.
"BEESWAX OIL," 357, 377.
"BEETON'S CHRISTMAS ANNUAL," 450.
"BELGRAVIA," 264, 265.
"BELL'S LIFE IN LONDON," 174.
"BENSON'S CAPCINE PLAISTERS," 562.
"BENTLEY'S MISCELLANY," 259.
"BETHESDA MINERAL WATER," 529.
"BHE HATHI" YARN, 646.
"BIRMINGHAM PATENT IRON AND BRASS TUBE CO. THE," 56.
"BIRTHDAY SCRIPTURE TEXT-BOOK, THE," 403.
"BISMARCK" COLLARS, 300.
BITTERS,
marks on. See SPIRITS.

BLACKING,
marks on, 21, 47, 76, 77, 120.
BLACK LEAD,
marks on, 343.
"BLANCHARD CHURN, THE," 358.
BOOK,
name of. See PUBLICATION.
"BOOTH'S THEATRE," 524.
BOOTS,
marks on, 375.
"BORWICK'S BAKING POWDERS," 161, 182.
BOTTLES,
imitation of, 48, 291, 421, 628, 653.
trade-marks moulded in, 157, 551, 608, 628, 652, 653.
plaintiff not disentitled by misrepresentation as to size of, 483.
"BOVILENE" POMADE, 319.
"BRAND'S ESSENCE OF BEEF," 534, 570.
BRANDY,
marks on. See SPIRITS.
BREACH OF CONTRACT
on sale of good-will restrained, 114, 303, 335, 350, 485, 548, 552, 604.
measure of damages for, 485.
damages not given for, where fraud on the public, 146.
as to use of initial, restrained, 419.
by licensor, damages given to exclusive licensee for, 489.
by registration of trade-mark, restrained, 530.
BREACH OF COVENANT,
not to use motto, held not to be committed, 546.
BREACH OF INJUNCTION,
motion to commit for, 77, 115, 200, 245, 463, 570, 595, 633.
attachment issued for, 353.
BREACH OF TRUST,
in respect of trade secret, restrained, 31, 110, 290.
publication of catalogue of etchings obtained by, restrained, 98.
"BRISTOL MERCURY, THE," 12.
"BRITANNIA, THE," 141.
"BROOK'S THREAD," 622.
"glacé thread," 190.
"BROOKLYN WHITE LEAD COMPANY," 154.
"BROOKMAN & LANGDON'S" LEAD PENCILS, 55.
BROOMS,
marks on, 342.
"BROSELEY PIPES," 243.

BRUSHES,
marks on, 81.
BUNDLES OF SILK,
mode of making up, 217.
"BURGESS' ESSENCE OF ANCHOVIES," 117, 169, 170.
BYRON,
unauthorized use of name of Lord, 23.

"CACHEMIRE MILANO" SILKS, 571.
CALCUTTA,
infringement of trade-marks by bazaar dealer at, 241.
"CALHOUN" PLOUGHS, 596.
CALIFORNIAN STATUTE OF 1863, 249.
"CALISAYA BARK, FERRO-PHOSPHORATED ELIXIR OF," 289.
"CANADA PLATES," 648.
"CAPITAL AND COUNTIES BANK, THE," 618.
CARDS,
injunction refused in case of stamp on, 2.
CARPET-STICKS AS TRADE-MARKS, 428.
"CARRIAGE BAZAAR," 294.
CASE,
action on the. See ACTION.
CATALOGUE OF PAINTINGS, 8.
etchings improperly obtained, publication of, restrained, 98.
CATTLE FOOD,
marks on, 560, 645.
"CAVE'S DRESS-BASKETS," 304.
CEMENT,
marks on, 282.
"CENTENNIAL" CLOTHING, 417.
alcoholic spirits, 470.
wines, 506.
"CHARBONNEL AND WALKER," 639.
"CHARITY," 440.
"CHARTER OAK" STOVES, 313.
CHEAT, 155.
"CHEAVIN'S FILTERS," 528.
"CHERRY PECTORAL," 574.
"CHERRY ST. MILLS" Flour, 405.
"CHINESE LINIMENT," 99, 109.
"CHLORODYNE," 230, 424.
"CHRISTY'S MINSTRELS," 137, 242.
"CHUBB'S SAFES," 255.

CHURNS,
marks on, 358.
CIGARS,
marks on. See TOBACCO.
CIRCUIT COURTS,
jurisdiction of the U. S. in cases of registered trade-marks, 613, 629.
CIRCULARS,
issue of deceptive, 92, 163, 193, 207, 272, 305, 438.
"CLARIBEL'S" SONGS, 293.
"CLARK'S THREAD," 148.
"CLARKE'S CONSUMPTIVE PILLS," 93.
CLASS OF GOODS,
trade-marks can only be acquired for a particular, 215, 223, 234, 257, 555, 559, 616.
infringement must be by use on the same, 314, 559.
assignment of a mark gives no right to use it on another, 502.
marks common in one, not necessarily common in other classes, 342, 579.
registration of old marks for part of a, granted, 555, 616, 623, 643.
new marks for part of a, refused, 645.
for a, for part of which alone an old mark was registered, refused, 655.
"CLICQUOT" CHAMPAGNE, 239.
CLOTH,
marks on, 1, 321, 400.
CLOTHING,
marks on, 417, 636.
"CLUB HOUSE" GIN, 187.
COAL,
marks on, 327, 599, 633.
COAL HEWERS,
false tokens used by, 287.
"COATS' THREAD," 79.
"COCOAINE," 277.
COCOATINA,
marks on, 298.
"COE'S SUPERPHOSPHATE OF LIME," 250, 489.
COLLAR BOXES
are not trade-marks, 538.
COLLARS,
marks on, 300.
"COLLINS & CO. Hartford Cast Steel, Warranted," 151, 152, 164, 171.

"COLOGNE, EAU DE," 113, 118, 130, 275, 592, 642, 654.
"COLONIAL LIFE ASSURANCE COMPANY, THE," 236.
COLORABLE
authority to use name, 76, 123, 243, 298, 390, 391, 409, 533, 534.
imitation, 76, 96, 103, 106, 119, 120, 123, 124, 134, 138, 150, 154, 170, 174, 175, 199, 200, 204, 213, 225, 228, 240, 244, 258, 271, 273, 275, 277, 291, 298, 310, 316, 317, 319, 329, 330, 331, 338, 345, 365, 366, 370, 374, 379, 395, 411, 415, 421, 435, 442, 445, 461, 463, 465, 466, 514, 545, 579, 580, 591, 603, 616, 617, 621, 636, 642, 646, 650, 651, 653.
See PARTIAL IMITATION.
no general rule to be laid down as to, 223.
statement as to relationship, 460.
"COLTON DENTAL ROOMS,"
late operator at the," 305.
COMBINATION MARKS ON COTTON GOODS, 581, 585.
COMMISSIONERS OF PATENTS IN ENGLAND,
position of the, 515, 540, 647.
in America, position of the, 525.
COMMIT,
motion to, 77, 115, 200, 245, 463, 570, 595, 633, 635.
See ATTACHMENT.
COMMITTEE OF EXPERTS AT MANCHESTER,
position of the, 586, 622, 632.
COMMON
marks cannot be protected as trade-marks, 85, 218, 223, 226, 227, 236, 251, 263, 269, 274, 279, 282, 286, 289, 296, 306, 339, 363, 364, 407, 410, 431, 440, 448, 513, 520, 541, 581, 593, 596.
See DESCRIPTIVE WORDS; QUALITY.
marks do not become, unless similar marks have been in actual use, 646.
under the Registration Acts marks used by more than three firms become, 558, 589, 593, 610, 611, 620.
COMPANIES ACT, 1862, THE, 618, 619.
COMPANY,
name of, 88, 92, 154, 221, 236, 318, 325, 340, 475, 476, 500, 507, 548, 566, 604, 618, 619, 640.
use of, restrained within certain limits, 325.
COMPROMISE OF PROCEEDINGS, 194, 209.
"CONDY'S FLUID" AND "OZONIZED WATER," 561.
"CONGRESS SPRING WATER," 354.
CONSTRUCTION,
principle of. See PRINCIPLE OF CONSTRUCTION.
"CONTEMPORARY REVIEW, THE," 539.

CONTEMPT,
attachment issued for, 353.
See COMMIT, MOTION TO.
CONTINUANCE
of action against administratrix refused, 482.
CONTRACT
for sale of attorney's practice enforced, 11.
goods to be supplied under a certain name or mark, questions as to, 216, 648.
implied on sale of surgeon's practice, 220.
CONVEYANCES,
use of name of hotel on, 104, 111, 266.
"COPAIBA,
Franks' Specific Solution of," 87.
COPYRIGHT,
trade-marks distinguished from, 84, 97, 130, 152, 246, 265, 292, 325.
connected with, 105.
in title of publication asserted, 638.
only protected with the rest of the publication, 410.
"CORRESPONDENT, THE," 246.
COSMETICS,
marks on. See TOILET, PREPARATIONS FOR THE.
COSTS
of litigation occasioned by infringement must be paid by infringer, 79, 81, 82, 169, 170, 171, 211, 213, 234, 255, 280, 387, 512.
though an infant, 255.
infringer can only escape paying, by offer of complete submission, 79, 136, 169, 170, 171, 234, 235, 321, 369, 583.
of unnecessary litigation, successful plaintiff deprived of, 63, 170, 253, 261, 369, 663.
occasioned by unfounded allegations thrown on successful plaintiff, 81, 258, 587, 608.
not given when both parties are *in pari delicto*, 144.
to successful but disingenuous defendant, 223, 230, 237, 257, 264, 265, 324, 442, 449, 478, 488, 498.
to plaintiff who demanded more than his right, 235, 488, 512.
delayed to take proceedings, 251, 500.
acted too hastily, 254, 583.
thrown upon plaintiff who had refused to accept a sufficient offer, 310.
disentitled by misuse of the word "patent" and aware of the objection, 267.
in doubtful case, 463.

COSTS — *continued.*
of motion to commit thrown on defendant, though motion refused, 200.
appearance on appeal thrown on party unnecessarily appearing, 369.
innocent agents relieved from payment of, 369.
given to innocent holders of goods spuriously marked, 369.
of questions as to registration, 593, 616, 621, 626, 637.
lien for, 369, 567.
COTTON GOODS,
marks on, 100, 134, 184, 186, 198, 199, 200, 204, 241, 307, 314, 338, 356, 411, 454, 500, 546, 581, 585, 586, 622, 646.
"COUGH REMEDY," 541.
COUNTER-CLAIM,
injunction granted on, 443.
"COURTRIA FLAX THREAD," 195.
COVENANT
compelling retiring partner to quit trade altogether, 5.
vendor of solicitor's practice to quit practice in Great Britain, 66.
to make good-will of business sold as profitable as possible, 20.
not to publish a periodical like one sold, 259.
not to trade within certain limits usual on sale of good-will, 168.
by vendor of good-will and trade name enforced, 485, 604.
"CRACK-PROOF" INDIA-RUBBER GOODS, 547.
CREST AND ARMS
as trade-marks, 251, 258, 338, 546, 592, 621, 622, 642, 654.
CRIMINAL OFFENCE. See CHEAT; FALSE PRETENCES; FORGERY; MISSOURI.
discovery of matters tending to convict of, not enforced, 188.
"CROCKETT'S LEATHER CLOTH," 223.
"CRONICA, LA," 295.
"CROSS" COTTON, 199, 200, 204.
"CROUP MEDICINE," 516.
"CROWLEY MILLINGTON" STEEL, 63.
"CROWN AND ANCHOR" WIRE, 213.
Seixo wine, 256.
paints, 402.
clothing, 636.
CRUCIBLES,
marks on, 267.
"CUNDURANGO OINTMENT, C. O." 376.
CUSTOM,
foreign, to infringe is no defence, 83.
of trade to place makers' marks on goods made for them, 164.

CUTLERS' COMPANY'S
marks, 222, 621, 643.
assignable where owned by a non-freeman, 222.
title to, must be perfected before registration, 643.
CUTLERY,
marks on, 82, 115, 222, 352, 359, 360, 361, 362, 442, 616, 621, 641, 643.
See EDGE TOOLS.
"CUTTER"
barrel, 373.
whiskey, 427.
"CYLINDER" GLASS, 121.

"D," THE LETTER,
in a lozenge, as a trade-mark, 371.
DAMAGE,
specific, need not be proved to constitute infringement of trade-mark, 50, 68, 82, 99, 196, 213, 280, 313, 379.
entitle to substantial damages for imitation of carriages on hire, 111.
for an interdict to be obtained in Scotland, 413.
where there is proof of, substantial damages will be given, 83.
the burden lies on the plaintiff to prove, 252.
DAMAGES,
nominal, given for infringement of right, 50, 59, 68, 82, 99.
exemplary, not to be given for infringement of trade-mark, 83.
substantial, given without proof of specific damage, 111.
inquiry as to, given, though persons other than the plaintiff interested in the mark, 243.
for breach of contract not given, there being a fraud on the public, 146.
occasioned by order for spuriously marked goods, action for, 194.
whole profits produced by sale awarded as, 347.
important elements in determining the amount of, 354.
not given where the defendants had acted *bonâ fide*, 387.
plaintiffs had delayed, 500.
profits which would have been made if an equal quantity of genuine goods had been sold, given as, 366, 481.
for breach of contract given to exclusive licensee against licensor, 489.
"DAVE JONES," WHISKEY, 437.
"DAVIS' PAIN KILLER," 103, 281.
"DAY AND MARTIN'S BLACKING," 21, 47, 76, 77.
DECEPTION,
there must be probability of, to constitute infringement of trade-mark, 53, 65, 72, 73, 84, 85, 91, 109, 123, 138, 157, 186, 215, 217, 223,

DECEPTION — *continued.*
230, 245, 256, 274, 293, 295, 332, 425, 426, 433, 459, 466, 478, 488, 529, 541, 550.
there must be probability of, to constitute infringement of name of company, 88, 221, 236, 618, 619, 640.
burden of proof as to probability of, 646.
"DECKER PIANO," 525.
DECREE, FORM OF, in U. S. Court, 667.
DEFENCE,
knowledge of immediate purchaser is no, 40, 79, 83, 84, 136, 213, 247, 253.
that a person infringing an author's rights is the owner of the copyright is no, 49.
the fact that no specific damage is proved is no, 50, 68, 82, 99, 196, 213, 280, 313, 379.
equality of quality is no, 50, 83, 84, 109, 213.
descriptiveness of plaintiff's mark is, 4, 59, 100, 144, 179, 187, 205, 232, 269. See DESCRIPTIVE WORDS.
plaintiff's own misrepresentations constituting, 60, 73, 90, 91, 133, 144, 191, 223, 232, 267, 308, 418, 434, 562, 575, 628.
not constituting, 10, 106, 132, 136, 180, 195, 276, 323, 325, 348, 483, 587, 591.
delay constituting, 116, 117, 118, 246, 314, 337, 352, 381, 442, 449, 628.
not constituting, 83, 110, 115, 132, 228, 244, 304, 313, 325, 344, 455, 580, 602, 638, 642.
on motion to commit, 115.
misuse of word "patent" constituting, 116, 223, 267, 288, 324, 343, 444, 528.
not constituting, 40, 119, 142, 214, 267, 304, 316, 384.
having ceased to use the mark infringed is no, 125.
not being registered at the Stamp Office as proprietor of newspaper is no, 141.
mark not having been on goods in the market is a, 140, 215, 223, 234, 264, 301, 339.
alienage is no, 78, 79, 83, 84, 151, 152, 164, 171.
having acquiesced gratuitously in the infringement is no, 100.
having adopted an additional mark is no, 226, 384.
having adopted the mark only recently is no, 215, 234.
not being solely interested in the mark is no, 80, 196, 243.
own improper conduct in misleading the defendant is, 265.
merely collateral misrepresentations are no, 291, 384.
own goods being injurious is no, for a defendant *in pari delicto*, 291.

DEFENCE — *continued.*
plaintiff's not having registered his mark in the United States is no, 352.
having partly purchased and partly invented is no, 367.
abandonment of his mark held not to be established, 367.
mark consisting of known words is no, if the combination is new, 390.
copyright being insufficient, held to fail, 390.
not being himself the manufacturer of the article is no, 461.
having used the mark beyond the limits fixed on the assignment to him is, 628.
publication having been long out of print is no, 638.
goods having become known in the market by a variety of names is no, 646.
defendant's name being placed in the spurious mark is no, 198, 226, 269, 280, 301, 310, 329, 609, 646.
may be an element of, 227, 232, 251, 363, 484, 608.
mark being permitted by foreign law is no, 275.
licensed by foreign sovereign is no, 352.
having ceased to use the spurious mark is no, 484, 603, 617.
not being personally cognizant of the fraud is no, 321, 583.
absence of fraudulent intention is no, 63, 99, 109, 157, 171, 174, 194, 204, 213, 247, 253, 313, 315, 329, 340, 387, 433, 466, 477, 500, 579, 580, 608, 646, 650.
foreign custom to infringe is no, 83, 275.
colorable differences are no, 76, 103, 138, 213, 228, 250, 256, 302, 305, 313, 329, 352, 370, 379, 395, 435, 636, 646, 650, 651, 653. See COLORABLE IMITATION.
absence of probability of deception is, 53, 65, 72, 73, 84, 85, 91, 109, 123, 138, 157, 186, 215, 217, 221, 230, 236, 245, 256, 274, 293, 295, 332, 425, 426, 433, 459, 466, 478, 488, 529, 541, 550, 618, 619, 640.
that the name used is the defendant's own name, and that there is no fraud, is, 82, 106, 117, 148, 180, 240, 257, 278, 427, 472, 521, 525, 534, 541, 560, 573, 580.
that the mark is used on other classes of goods, is no, 579.
DELAY,
plaintiff disentitled by, 116, 117, 118, 246, 314, 337, 352, 381, 442, 449, 628.
on motion to commit, 200.
to account, 244, 251, 500, 580.
to costs, 251, 500.
to damages, 500.

DELAY — *continued.*
plaintiff not disentitled by, 83, 110, 115, 132, 228, 244, 304, 313, 325, 344, 455, 580, 602, 638, 642.
on motion to commit, 115.
for the purpose of obtaining evidence, 304, 325.
effect of, on the account, 384, 580.
does not affect right to injunction, 580, 665.
DELIVERY-UP
of spuriously marked goods for erasure, 196, 211.
after erasure to indorsee of dock-warrants, 229.
"DEMOCRATIC REPUBLICAN NEW ERA, THE," 65.
"DENT'S WATCHES," 196.
"DERRINGER'S PISTOLS," 249, 347.
DESCRIPTIVE
device, 425, 527.
words cannot be claimed, 59, 279, 528, 529, 541. See COMMON MARKS; QUALITY.
"Dr. Johnson's Yellow Ointment," 4.
"A. C. A." cotton tickings, 100.
"Burgess' Essence of Anchovies," 117.
"Galen," "Lake," "Cylinder," "Wayne," "New York" glass, 121.
"Balm of Thousand Flowers," 144, 145.
"Schiedam Schnapps," 179, 415, 653.
"Club House Gin," 187.
"Paraffin Oil," 205.
"Extract of Night-blooming Cereus," 232.
"Old London Dock Gin," 240.
"Liebig's Extract of Meat," 286.
"Ferro-Phosphorated Elixir of Calisaya Bark," 289.
"Desiccated Codfish," 306.
"Lackawanna Coal," 327.
"Antiquarian Book-store," 336.
"Beeswax Oil," 357, 377.
"Razor-Steel," 362.
"Mammoth Wardrobe," 363.
"Cundurango Ointment, C. O." 376.
"Invisible" face-powder, 378.
"Macassar Oil," 386.
"Lieut. James' Horse-blister," 388.
"Golden Ointment," 389.
"Parson's Purgative Pills, P. P. P." 404.
"Johnson's American Anodyne Liniment, Established A. D. 1810," 404.

DESCRIPTIVE — *continued.*
"New Manny Harvester, The," 412.
"Richardson's Patent Union Leather-splitting Machine," 115.
"American Sardines," 422.
"Chlorodyne," 424.
"Loch Katrine" whiskey, 452.
"Julienne" soup, 461.
"Tasteless" drugs, 493.
"Für Familien Gebrauch," 504.
"Lawrence Feiner Familien Flannel," 504.
"Croup Medicine," 516.
"Station Hotel," 520.
"Cough Remedy," 541.
"Crack-proof" india-rubber, 547.
"Cachemire Milano," 571.
"Cherry Pectoral," 574.
"Highly Concentrated Compound Fluid Extract of Buchu," 575.
"Egg Macaroni," 577.
"Angostura Bitters," 591.
"Valvoline" oil, 597.
"Iron-stone" water pipes, 612.
"Anglo-Portugo Oysters," 625.
"Porous" plasters, 626.
"Ne Plus Ultra" needles, 262.
"Nourishing Stout," 431.
"East Indian Medicines," 670.
"Post Office" directory, 661.
"Charity" as name of a play, 440.
"Iron Stone," 612.
"Singer Machine," 659.
"DESICCATED CODFISH," 306.
DESIGN PATENT,
will not be granted in the United States to a trade-mark, 341.
distinguished from trade-mark, 582.
"DEVLIN & CO." 463.
DIRECTIONS FOR USE,
imitation of, 31, 50, 99, 163, 296, 432, 560.
DISCONTINUANCE OF USE,
by plaintiff of genuine mark, is no defence, 125.
defendant of spurious mark, is no defence, 484.
DISCOVERY,
enforced in full, 203, 224, 519.

DISCOVERY — *continued.*
enforced in full, with limitations, 356.
of matters tending to convict of a criminal offence not enforced, 188.
DISENTITLED,
plaintiff, by his own misrepresentations, 60, 73, 90, 91, 106, 133, 144, 191, 223, 267, 291, 308, 418, 434, 562, 575, 628.
however obvious they may be, 223.
misuse of the word "patent," 116, 223, 267, 288, 324, 343, 444, 528.
improper conduct in misleading the defendants, 265.
delay, 116, 117, 118, 246, 314, 337. 352, 381, 442, 449, 628.
retaining guarantee of his assignor's personal inspection, 575.
using trade-marks beyond the limits fixed on assignment, 628.
not, by incorrect statements as to authorship of his magazine, 10.
authorship of his musical composition, 132, 136.
make of his thread, 142, 195.
size of his bottles, 483.
his "pianoforte tutor," 587.
as against a defendant *in pari delicto*, 180.
assumption of title of professor, 106.
use of word "patent," 40, 119, 142, 214, 267, 304, 316, 384.
name of vendor of the business, 323.
delay, 83, 110, 115, 132, 228, 244, 304, 313, 325, 344, 455, 580, 602, 638, 642.
alienage, 78, 79, 83, 84, 151, 152, 164, 171.
discontinuing the use of the mark infringed, 125.
non-registration at the Stamp Office as proprietor of a newspaper, 141.
book having been long out of print, 638.
his goods having become known by a variety of names, 646.
DISMISSAL
of suit for injunction, abandonment of trade-mark by, 230.
DISSOLUTION,
of partnership, right of partners on, 37, 122, 149, 156, 172, 173, 176, 177, 180, 202, 206, 207, 210, 215, 238, 248, 260, 368, 383, 393, 406, 408, 437, 455, 548, 561, 566, 585, 639.
notices of, not to be published until expiration of term, 75.
specific performance granted of agreement between solicitors on, 135.
"DIXON'S STOVE-POLISH," 331.
"DOCTOR
Johnson's Yellow, or Golden Ointment for the Eyes," 4, 38, 389.
"Morse's Indian Root Pills," 180.

"DOCTOR"—*continued.*
"J. M. Lindsey's Improved Blood-Searcher," 279.
"Simmons' Liver Medicine," 348.
"Lobenthal's Essentia Antiphthisica," 497.
"J. Blackman's Genuine Healing Balsam," 502.
"C. M'Lane's Liver Pills," 580.
DOG-BISCUITS,
marks on, 488, 644, 645.
"DOWNER, BEMIS & CO." 231.
"DUBLIN" SOAP, 565.
"DURABLE" PRINTERS' ROLLERS, 630.
"DURHAM SMOKING TOBACCO," 392, 399, 466, 590.

"EAGLE BRAND" IRON, 258.
"Pencil Company, The," 522.
"EAU-DE-COLOGNE," 113, 118, 130, 275, 592, 642, 654.
"ECONOMIC CONVEYANCE COMPANY, THE," 86.
EDGE-TOOLS,
marks on, 151, 152, 164, 171.
See CUTLERY.
"EDINBURGH CORRESPONDENT, THE," 34.
"Philosophical Journal, The," 39.
EDITOR OF NEWSPAPER,
rights of, 39, 181, 450.
"EGG MACARONI," 577.
"EICHELE & CO.'S" MATCHES, 485.
ELEMENTS,
necessary to found jurisdiction of court, 228, 234.
"ELEPHANT CHOP" CLOTHS, 198.
yarn, 646.
"ELKINGTON'S A" SPOONS, 147.
EMBROIDERY COTTON,
marks on, 199, 200, 204.
"EMERSON'S ELASTIC RAZOR STROP," 309.
EMPLOYMENT,
rights of servant on leaving. See FORMER EMPLOYMENT.
"ENGLAND'S QUEEN" SEWING-MACHINES, 459.
"ENGLISH'S X BROOMS," 342.
ENGRAVERS,
infringement of trade-marks by, 89, 113.
ENLARGEMENT
of injunction to cover further fraud, 200.
"ENO'S FRUIT SALT," 609.
"EQUAL TO DAY & MARTIN'S" BLACKING, 47.

EQUALITY IN QUALITY IS NO DEFENCE, 50, 83, 84, 109, 213.
"ERA, THE," 550.
ERASURE OF SPURIOUS MARKS, 196, 211, 369.
"ESSENCE
of anchovies, Burgess'," 117, 169, 170.
" beef, Brand's," 534, 570.
"ESTCOURT'S HOP SUPPLEMENT," 449.
ETCHINGS,
publication of catalogue of, improperly obtained, restrained, 98.
"ETHIOPIAN STOCKINGS," 80.
"EUREKA
Ammoniated Bone Superphosphate of Lime," 364.
shirts, 384.
"EVERETT'S PREMIER" BLACKING, 120.
EVIDENCE
of defendant's intention, 72.
plaintiff not disentitled by delay for the purpose of obtaining, 304, 325.
"EX 1eres DE LA MAISON BOISSIER DE PARIS," 498.
"EXCELSIOR" COTTON GOODS, 546.
white soft soap, 226.
EXCEPTIONS FOR SCANDAL, 414.
EXCLUSION
of patentee from using his own name as his trade-mark by its prior adoption by another, 284.
EXCLUSIVE
right in article exists only by patent, 3, 4, 19, 59, 68, 84, 99, 103, 130, 388, 389, 416, 461, 591, 628.
trade-mark acquired by long user, 51, 459.
without long user, 215, 234, 325, 364.
only for a particular class of goods, 215, 223, 234, 257.
by purchase from trustees for creditors, 222, 323, 575.
which contains a false assertion cannot be obtained, 223.
And see REPRESENTATIONS.
has been partly purchased and partly invented, 367.
words maintainable, irrespective of fraudulent imitation, 63.
And see FRAUDULENT INTENTION.
not maintained, 57.
of quality cannot be maintained, 59, 85, 100, 121, 187, 226, 232, 236, 269, 279, 289, 339, 410, 431, 541, 557, 581, 626.
And see DESCRIPTIVE WORDS.
right in name applied to goods made under patent not claimable, 205, 474, 528, 536, 561, 578.
prize medal not claimable, 218.

EXECUTORS,
action by, 338, 347.
EXEMPLARY
damages not to be given for infringement of trade-mark, 83.
EXHIBITION
in public held to be evidence of defendant's *bona fides*, 251.
EXPERTS,
committee of, at Manchester, 586, 622, 632.
EXPORTER OF GOODS,
question between manufacturer and, 585.
" EXTRACT OF MEAT,
Liebig's," 286.

"FABER'S PENCILS," 278.
FALSE PRETENCES, 120, 147, 155, 161, 182, 183, 285, 287, 349.
FAMILY
name, no right of property in, 312.
residence, no right of property in name of, 631.
FANCY NAMES
valuable in proportion to their extravagance, 145, 205.
" Howqua's Mixture " tea, 60.
" Medicated Mexican Balm," 73.
" Persian Thread," 78, 83, 84, 124.
" Ethiopian Stockings," 80.
" Wistar's Balsam of Wild Cherry," 90.
" Chinese Liniment," 99, 109.
" Perry Davis's Pain Killer," 103, 281.
" Everett's Premier " blacking, 120.
" Kathairon," 133.
" Balm of Thousand Flowers," 144, 145.
" Genuine Yankee Soap," 150, 225, 662.
" Dr. Morse's Indian Root Pills," 180.
" Meen Fun " skin powder, 191.
" Cross " cotton, 199, 200, 204.
" Anchor Brand " wire, 213.
" Excelsior White Soft Soap," 226.
" Chlorodyne," 230.
" Anatolia " liquorice, 234.
" Ox " mustard, 244.
" Star " iron, 271.
pencils, 481.
oil, 486.
" Sweet Opoponax of Mexico," 276.
" Cocoaine," 277.

FANCY NAMES — *continued.*
"Bismarck" collars, 300.
"Hero" jars, 301.
"Golden Crown" cigars, 308.
"Charter Oak" stoves, 313.
"Bovilene" pomade, 319.
"Grenade" syrup, 334.
"Congress Spring" water, 354.
"Eureka" goods, 364, 384.
"Silver Grove" whiskey, 374.
"Beaverine" boots, 375.
"Durham Smoking Tobacco," 392, 399, 466, 590.
"Keystone Line" of steamships, 396.
"Turin," "Sefton," "Leopold," "Liverpool" cloth, 400.
"Centennial Clothing," 417.
"wines," 506.
"Magnolia," "Dave Jones" whiskey, 437.
"Rising Sun" stove polish, 445.
"Licensed Victuallers' Relish," 447.
"Pectorine," 458.
"Gouraud's Oriental Cream," 460.
"Slate Roofing Paint," 471.
"German Sirup," 473.
"Lion" goods, 501.
"Tamar Indien" lozenges, 532.
"Lactopeptine" medicine, 543.
"Dublin" soap, 565.
"Wamsutta" muslin, 660.
"Mrs. Mills' Cream," 664.
"FARINA'S EAU DE COLOGNE," 113, 118, 130, 275, 592, 642, 654.
"FERRO-PHOSPHORATED ELIXIR OF CALISAYA BARK," 289.
"FIBRINE DOG-CAKES," 644.
FILTERS,
marks on, 528.
FIREWORKS,
marks on, 253.
FIRM NAME. See TRADE NAME.
FLANNEL,
marks on, 504.
"FLAVEL'S PATENT KITCHENER," 116.
"FLOR FINA PRAIRIE SUPERIOR TABAC" cigars, 433.

FLOUR,
marks on, 367, 405, 490, 649.
"FORD'S EUREKA SHIRT," 384.
FOREIGN
custom to infringe trade-marks is no defence, 83.
language, words in, used as trade-marks, 51, 334, 411, 581, 647.
trade-marks, infringement of. See ALIENS.
FORGERY, 155, 161.
FORMER EMPLOYMENT
may be stated by a former servant or member of a firm so as not to produce deception, 107, 210, 223, 247, 254, 309, 398, 498, 534.
but not in such a way as to produce deception, 117, 119, 247, 305, 398, 566.
nor in breach of contract, 552.
FORWARDING AGENTS,
injunction against, 369.
"FRANKS' SPECIFIC SOLUTION OF COPAIBA," 87.
FRAUD
disentitling to remedy. See DEFENCE ; DISENTITLED.
name of place of business may be used without, 521.
on the public. See PUBLIC.
FRAUDULENT
intention, there may be infringement without, 69, 99, 109, 157, 171, 174, 194, 204, 213, 247, 253, 313, 315, 329, 340, 387, 433, 466, 477, 500, 579, 580, 608, 646.
trade-marks may not be imitated with, 73, 119, 294, 398, 407, 433, 542, 580, 650.
must be proved in a common law action, 2, 4, 72, 82, 140, 213, 338.
an action under 5 & 6 Will. IV. c. 83, § 7, 167.
imitation of name over shop frontage, 304.
use of another's testimonials, restrained, 87.
man's own name, restrained, 106, 117, 124, 148, 333, 340, 388, 580.
"FRESE & CO.'S" TEA, 484, 603.
"FROM
Thresher & Glenny," 247.
" the late R. Hendrie," 254.
" Hookham & Pottage," 398.
"FRUIT SALT, ENO'S," 609.
"FULLWOOD & CO.'S" ANNATTO, 421, 602.

"GALEN" GLASS, 121.

GENUINE
marks, infringement by misuse of, 126, 253, 441, 549, 556, 650, 651.
Yankee soap, 150, 225.
GEOGRAPHICAL NAMES
as trade-marks, 234, 282, 327, 339, 392, 399, 405, 407, 410, 439, 452, 529, 542, 565, 590, 599, 601.
"GERMAN SIRUP," 473.
"GILLOTT'S PENS," 126, 269.
GIN,
marks on. See SPIRITS.
"GLACÉ" THREAD, 190.
GLASS,
marks on, 121.
"GLENDON" IRON, 439.
"GLENFIELD STARCH," 329.
"GLOBE" CUTLERY, 641.
"GOLD MEDAL" SALERATUS, 448.
"GOLDEN OINTMENT," 389.
"GOLSH'S FRICTION MATCHES," 91.
"GOODS AND CHATTELS,"
within the Bankruptcy Acts, good-will of newspaper passes as, 12, 159.
trade-mark passes as, 537.
GOOD-WILL,
what is, 17, 25, 45, 58, 74, 128, 139, 156, 172, 206, 385, 462, 588.
personal and local, distinguished, 69, 462.
of profession and of trade, distinguished, 156, 588.
of newspaper, what is, 576.
incapable of seizure by a sheriff, 159.
connection of, with the business itself, 189.
trade name, 172.
marks, 91, 168, 331, 350, 630.
trade-marks cannot be severed from, 331, 447, 487, 492.
of trading business is assets, 3, 6, 35, 58.
of professional practice held to be assets to some extent, 102.
not to be assets, 46, 588.
of partnership is assets, 16, 64, 70, 139, 165, 176, 177, 185, 192, 202, 206, 210, 215, 248.
of newspaper is partnership assets, 173, 178.
"goods and chattels" within the Bankruptcy Acts, 12, 159.
of partnership carried on under articles held to survive, 139, 208.
without articles held to survive, 9.
not to survive, 14, 64, 139, 165, 185.
may not be appropriated by one of the partners, 75, 122, 149, 202, 206.

GOOD-WILL — *continued.*
of medical practice held to survive, 28.
of newspaper held not to survive, 35.
of married woman's business survives to her, 131.
transmission of, on bankruptcy, 69, 323, 575.
of public-house held to be incident to the stock and license, 74.
value of, how ascertained, 462.
option under articles to representative of deceased partner to retain share in, enforced, 127.
value of deceased or retiring partner's interest in, how ascertained, 70, 156, 158, 176, 177, 206, 208, 215, 238, 248, 260, 451.
of share in business, specific transfer of, under legacy, not enforced, 189.
sale of, 11, 13, 20, 25, 27, 32, 36, 45, 58, 62, 102, 114, 128, 153, 158, 168, 172, 176, 185, 220, 238, 248, 406, 423, 479, 485, 576, 588, 639.
facts to be stated on, 37, 158, 215, 238.
sum payable on, 20, 25, 27, 32, 156, 158, 260.
assignment on, subject to duty within the Stamp Acts, 128.
by executors, 479.
assignees in bankruptcy, 323, 575.
trade-mark held to pass on, without express mention, 350, 354.
name held to pass on, without express mention, 639.
not to pass on, 185, 575.
when it can be specifically enforced, 153, 168.
of legal practice permissible, 11.
after vendor restrained from practising in Great Britain, 66.
agreement for, not specifically enforced, 22, 71.
of medical practice, implied contract on, 220.
of public-house, specific performance of agreement for, granted, 43.
specific performance of agreement for, refused, 42, 153.
breach of contract on, restrained, 114, 303, 335, 350, 485, 548, 552, 604.
after, vendor may set up a similar business, 17, 25, 27, 172, 383, 406.
may not set up the same business, 17, 25, 29, 207, 272, 323, 385, 423.
a similar business in the same situation, 25, 36, 172, 323.
rights of purchaser of, 479, 639.
held not to be included in partnership "property, credits and effects," 129.
"stock in trade and effects," 129.
"premises, stock in trade," etc., 208.
"stock in trade, goods, chattels, and effects," 260.
"estate and effects," as ascertained by annual valuation, 605.

GOOD-WILL — *continued.*
held to be included in "stock belonging to the partnership," 215.
partnership "premises and effects," 350.
"effects and things," 614.
"property and effects," 615.
"GOOD-WILL," ETC.
the meaning of the expression, explained, 168.
"GOURAUD'S ORIENTAL CREAM," 460.
"GOVERNMENT SANITARY COMPANY, THE," 604.
"GREAT MOGUL" STAMP ON CARDS, 2.
"GRENADE SYRUP," 334.
GROSS,
trade-marks cannot be acquired in, 447, 487, 492, 630.
except by the previous maker of the goods, 492.
"GUINEA COAL COMPANY, THE," 325.
"GUINNESS' STOUT," 89, 617.
"GUNPUTTY" YARN, 646.
GUNS,
marks on, 441.

"HALL'S VEGETABLE SICILIAN HAIR RENEWER," 335, 353.
HALL-MARK,
transposition of, criminally punishable, 54.
false representation as to, 285.
"HALLETT AND CUMSTON," 391.
"HARRISON'S MUSTARD," 244.
"HARVEY'S SAUCE," 160, 344, 346.
"HAXALL" FLOUR, 490.
HEADINGS ON COTTON GOODS, 454, 581, 585.
HELIOTYPES,
marks on, 430.
"HELMBOLD'S HIGHLY CONCENTRATED COMPOUND FLUID EXTRACT OF BUCHU," 575.
"HEMY'S ROYAL MODERN TUTOR FOR THE PIANO-FORTE," 587.
"HENNESSY & CO.'S COGNAC," 483, 531, 549, 556, 650, 651.
"HENRY'S CALCINED MAGNESIA," 48.
"HERO" GLASS JARS, 301.
"HOBART FENN & CO." 166.
"HOLBROOK'S SCHOOL APPARATUS," 263.
"HOLLOWAY'S PILLS AND OINTMENT," 106.
"HOME AND COLONIAL LIFE ASSURANCE COMPANY (LIMITED), THE," 286.
HONES, marks on, 50.

"HOOKHAM AND POTTAGE," 398.
HOOPS ON BARRELS
are not trade-marks registrable in the United States, 480.
"HOP SUPPLEMENT, ESTCOURT'S," 449.
HORSE BLISTERS,
marks on, 209, 388.
"HOSTETTER'S CELEBRATED STOMACH BITTERS," 366, 652.
HOTEL,
name of "Irving House," 108.
"What Cheer House," 212.
"McCardel House," 233.
"Wood's Hotel," 467.
"Station Hotel," 520.
use of, on carriages, "Irving House," 104.
"Revere House," 111.
"Prescott House," 266.
is assignable, 467.
belongs to lessee of hotel, 212, 467.
HOUSE,
name of, "Osborne House," 323.
"Booth's Theatre," 524.
"Ashford Lodge," 631.
"HOUSEHOLD WORDS," 173.
"HOWE" SEWING-MACHINES, 203, 284, 569.
"HOWE'S BAKERY," 185.
"HOWQUA'S MIXTURE" TEA, 60.
HUNGARIAN NOTES,
spurious issue of, restrained, 197.

IDENTICAL,
marks need not be, to constitute infringement, 100, 138, 184, 250, 256, 305, 313, 329, 352, 370, 514, 579, 636, 646.
And see COLORABLE IMITATION.
registration of two, 589.
substance, injunction limited so as not to restrain the use of the mark on the, 591.
"ILLUSTRATED,"
the word, cannot be exclusively appropriated, 85.
IMITATION, COLORABLE. See COLORABLE IMITATION.
"IMPERIAL IRON TUBE COMPANY, THE," 566.
IMPOSITION
on the public is the test of infringement, 215, 223.

INDIAN CASES, 241, 315.
"Root Pills," 180.
"INDIA-RUBBER
Comb Company, The," 475, 476.
goods, marks on, 475, 476, 507, 547.
INDICTMENT. See CHEAT; FALSE PRETENCES; FORGERY.
INFANT INFRINGER
must pay the costs of the proceedings, 255.
INFERIORITY IN QUALITY
not required to constitute infringement, 50, 83, 84, 109, 213.
no ground of action where name used is common, 59.
INFRINGEMENT,
principles on which, is prohibited, 73, 76, 84, 91, 100, 108, 109, 124, 126, 130, 145, 154, 213, 215, 223, 269, 270, 302, 320, 325, 329, 340, 354, 407, 413, 466, 477, 580, 649, 665, 667.
what constitutes, 73, 76, 89, 109, 123, 138, 213, 223, 234, 241, 256, 300, 425, 433, 474, 500, 579, 580, 636, 646, 650, 653, 665, 667, 674.
marks need not be identical to constitute, 100, 138, 184, 250, 256, 305, 313, 329, 352, 370, 514, 579, 636, 646, 665, 674.
probability of deception is necessary to constitute, 53, 65, 72, 73, 84, 85, 88, 91, 109, 123, 138, 157, 186, 215, 217, 221, 223, 230, 236, 245, 256, 274, 293, 295, 332, 425, 426, 433, 459, 466, 478, 488, 529, 541, 550, 618, 619, 640.
colorable. See COLORABLE IMITATION.
fraudulent intention is not necessary to constitute, 63, 99, 109, 157, 171, 174, 194, 204, 213, 247, 253, 313, 315, 329, 340, 387, 433, 466, 477, 500, 579, 580, 608, 646.
progressive, 275, 514.
imposition on the public is the test of, 215, 223.
knowledge of the immediate purchaser is immaterial in case of, 40, 79, 83, 84, 136, 213, 253, 646.
equality of quality is immaterial in case of, 50, 83, 84, 109, 213.
actual deception or specific damage is not necessary to constitute, 50, 68, 82, 99, 196, 280, 313, 379.
by misuse of genuine labels and stamps, 126, 253, 441, 549, 556, 650, 651.
by adoption of name tending to produce deception, 256, 636.
by engravers, 89.
by printer, 113, 130.
must be by user on same class of goods, 314, 559.
no injunction obtainable in early times to restrain, 2.
mode of trial of action for, 644.
of name of newspaper, what is, 34.

INFRINGEMENT — *continued.*
of rights of legal author, what is, 49.
expounded and explained, 665, 672, 674.
where mark not attached to the goods, 672.
INITIAL LETTERS,
trade-marks consisting of, or containing, 53, 61, 63, 72, 100, 199, 200, 204, 215, 216, 222, 307, 338, 371, 376, 404, 493, 530, 533, 537, 540, 567, 568.
injunction granted to restrain the use of, in breach of contract, 419.
INJUNCTION,
jurisdiction of court to protect property from injury by, 197, 665.
fraud on the public is no ground for an, 7, 455, 487, 639.
enlarged to cover further fraud, 200.
limited to goods not yet arrived, 370.
interlocutory, refused, where nothing had been done, 536.
granted, though persons other than the plaintiffs interested in the marks, 80, 196, 243.
notwithstanding offer of submission by defendant, 63, 169, 170, 171, 235, 261, 411, 663.
that no previous application had been made to defendant, 169, 280, 653.
that defendants were ignorant even of plaintiffs' existence, 204.
that plaintiffs' mark had been used first by others, 276.
on counter-claim, to restrain use of address, 443.
so as not to restrain use of mark on identical goods, 591.
until certain events, 591, 599.
to restrain publication of catalogue of etchings improperly obtained, 98.
partial imitation, 100, 138, 184, 250, 256. And see IDENTICAL MARKS.
misuse of genuine marks, 126, 253, 441, 549, 556, 650, 651.
surviving partner from trading under a new name, 127.
infringement by forwarding agents, 369.
soliciting customers, 114, 141, 207, 385, 566.
publication of statements as to newspaper, 162, 173.
injurious to property, 211.
the unauthorized use of trade name by purchaser of good-will, 185.
misrepresentations by lessees of fire-brick works, 193.
issue of spurious Hungarian notes, 197.
one partner from monopolizing the good-will of the partnership on dissolution, 202, 566.

INJUNCTION — *continued.*
granted to restrain infringement, though plaintiff had adopted an additional mark, 226, 646.
purchaser of hotel from using plaintiff's name, 233.
action for damages for non-delivery of spuriously marked goods to indorsee of dock-warrants, 239.
the appearance of a man's name in connection with a magazine, 259.
a purchaser from one of two partners from monopolizing the partnership style, 268.
passing goods spuriously marked into the market, 299, 326.
exact imitation only, 557.
improper representations on dissolution of partnership, 566.
the use of name of hotel. See HOTEL.
house. See HOUSE.
man's own name, where fraud exists, 106, 117, 124, 148, 333, 340, 388, 580.
discontinued mark, 125.
spurious mark, since discontinued, 484.
name of publication. See MUSICAL COMPOSITION; PUBLICATION; SONG.
name of company. See COMPANY.
moulded bottles, 551, 652, 653.
appellation of medical man, 328.
a father's altered name by his sons, 460.
labels and wrappers, but refused as to name of goods, 512, 653.
name of goods by persons who had manufactured for the plaintiff, 517.
trade-marks on goods sent to a specified market, 581.
a trade-mark to which registration had been refused, 646.
breach of contract on sale of good-will, 25, 29, 114, 303, 335, 350, 485, 548, 552.
by singer, 112.
as to use of initial, 419.
not granted, where joint plaintiffs were not entitled to joint relief, 44.
the defendant's book was not represented to be the plaintiff's, 67.
plaintiff's title not clear, 134, 145, 191, 246, 284, 374, 391, 410, 487, 492, 494, 512.
plaintiffs set a trap for the defendant, 556.
on account of former close business relations between the parties, 109.
unless plaintiff's mark on vendible goods in the market, 140, 215, 223, 234, 264, 301, 339.

INJUNCTION — *continued.*
not granted to restrain sale of genuine goods, 143.
publication of an unfair report of proceedings in a trade-mark case, 190.
unauthorized use of prize medal, 218.
breach of covenant not to use motto, 546.
a fair comparison of rival articles, 574.
use of deceased partner's name by surviving partners, 7.
man's own name, where no fraud, 82, 106, 117, 148, 180, 240, 257, 278, 427, 472, 521, 525, 534, 541, 573, 580.
moulded bottles, 157, 608, 628.
trade name, 283.
motion to commit for breach of, 77, 115, 200, 245, 463, 570, 595, 633, 635.
attachment issued for breach of, 353.
INK,
marks on, 273, 510.
INNOCENT VENDORS,
price of spuriously marked goods recovered by, 101.
INSCRIPTIONS
on bottles, etc., 18, 31, 163, 248.
claimed as trade-marks, 123, 523, 541.
INSOLVENCY
produced by defending an action for infringement of trade-mark, 649.
INSPECTION,
order made for, 531.
INTENTION
of infringer immaterial, 63, 99, 109, 157, 171, 174, 194, 204, 213, 247, 253, 313, 315, 329, 340, 387, 433, 466, 477, 500, 579, 580, 608, 646.
INTERDICT
granted in Scotland to restrain improper use of name of sheriff's officer, 438.
INTERFERENCES
in the United States Patent Office, 399, 417, 437, 496, 554, 627.
INTERIM INTERDICT
refused in Scotland till after damages recovered, 262.
INVENTION
of article on which trade-mark is used is immaterial, 91, 339, 390, 580.
trade-mark is immaterial, 138, 410, 554.
"INVISIBLE" FACE POWDER, 378.
IRON,
marks on, 72, 215, 216, 258, 271, 439, 530, 540, 555, 623, 524, 648.
And see CUTLERY; STEEL.

IRON — *continued.*
"iron-stone" water-pipes, 612.
"Iron Trade Circular, The," 420.
"IRVING HOTEL," 104, 108.

"JAMES' HORSE BLISTERS," 209, 388.
JARS,
marks on, 301, 444, 578.
"JOHN BULL, THE," 33.
"JOHN BULL AND BRITANNIA, THE," 141.
"JOHN DOUGLAS & CO." 172.
"JOHN G. LORING & CO." 201.
"JOHN C. RAGSDALE Ammoniated Dissolved Bone," 554.
"JOHN SCOTT & CO." 393.
"JOHNSON'S AMERICAN ANODYNE LINIMENT, ESTABLISHED A. D. 1810," 404.
JOINT
plaintiffs not entitled to joint relief, 44.
JUDICATURE ACT, 1873, sec. 25, sub-s. 8, 564, 594, 606, 607, 631.
"JULES JURGENSEN, COPENHAGEN," WATCHES, 211.
"JULIENNE" SOUP, 461.
JURISDICTION
of court, elements necessary to found, 228, 234.
of U. S. Circuit Court in cases of registered trade-marks, 613, 629.
JURY,
questions for the, 49, 56, 72, 82, 92, 120, 167, 338.

"K. & G. PATENT ELASTIC" PENHOLDERS, 167.
KAINIT,
marks on, 397.
"KEYSTONE LINE" OF STEAMSHIPS, 396.
"KIRBY'S *ne plus ultra*" NEEDLES, 251.
KITCHENER,
marks on, 116.

"L. H. & S." WINE, 537.
"L. L." WHISKEY, 228.
LABELS,
complicated stamps on leather cloth held not to be trade-marks, but mere, 223.
LACHES. See DELAY.
"LACKAWANNA" COAL, 327.
"LACTOPEPTINE" MEDICINE, 543.
"LAFERME" CIGARETTES, 512.

"LAIRD'S BLOOM OF YOUTH, OR LIQUID PEARL," 418.
"LAKE" GLASS, 121.
LANCASTER,
cases in the Chancery Court of, 328, 581.
LANGUAGES,
words in modern foreign, used as trade-marks, 51, 334, 411, 581, 647.
use of several, in labels, 291, 411, 432, 591.
LARD,
marks on, 425.
"LATE
of Lundy Foot & Co." 107.
" of 107 Strand," 117.
" Tayler & Co., J. Vick from the," 119.
" Harpers & Moore," 193.
" Leach & Clark," 210.
" with Crockett," 223.
" Robert & Walter Scott," 268.
" operator at the Colton Dental Rooms," 305.
" of Headington Hill, Oxford, and formerly of Mayfair," 552.
" the works of and partners and managers in the Imperial Tube Company," 566.
" of Somerset Place, Hoxton," 602.
"LAZENBY'S HARVEY'S SAUCE," 344, 346.
LEATHER CLOTH,
marks on, 214, 223, 224, 252, 324.
LEGAL AUTHOR,
improper use of name of, 49.
"LEOPOLD" CLOTH, 400.
"LEOPOLDSHALL KAINIT," 397.
LETTERS,
opening, 75, 219, 237, 423.
trade-marks consisting of or containing, 53, 61, 63, 72, 100, 199, 200, 204, 215, 216, 222, 307, 371, 338, 376, 404, 493, 530, 533, 537, 540, 567, 568.
deception assisted by use of small, 47, 107, 212, 247, 305, 398, 534, 650.
large, 329.
LIBEL,
question as to injunction to restrain, 30, 52, 67, 93, 94, 95, 424, 438, 453, 457, 564, 594, 606, 607.
LICENSE,
plaintiff must prove that defendant has no, 228.
gratuitous acquiescence by owner in infringement is mere revocable, 100, 137.

LICENSÉ — *continued.*
to use trade-mark and sue infringers, acquiescence by owner of trade-mark must amount to, to cause motion to commit to fail by reason of delay, 115.
to use name on hotel, held to be revocable, 233.
to use name of hotel on coaches held to be revoked on sale of hotel by licensor, 266.
trade-mark on goods made according to patent by, 284.
from foreign sovereign to use spurious trade-marks is no defence, 352.
to use a certain name on a line of steamships, 396.
to use a certain partnership name, 406.
to use a trade-mark exclusively for a certain period, 502.
"LICENSED VICTUALLERS' RELISH," 447.
LICENSOR,
damages given to exclusive licensee against, 489.
"LIEBIG'S EXTRACT OF MEAT," 286.
LIEN
on spuriously marked goods for costs, 369, 567.
"LIEUTENANT JAMES' BLISTERING COMPOUND," 200.
LIME JUICE,
marks on, 551, 608.
LINE
of omnibuses, 57.
steamships, 396.
LINNELL'S PAINTINGS, 155.
"LINOLEUM," 536.
"LION"
hall-mark, transposition of, 54.
"chop" cloths, 198.
mark registered in alternative shape, 501.
LIQUORICE,
marks on, 234.
"LITTLE RED BOOK, THE," 478.
"LIVE AND LET LIVE" OYSTER AND DINING SALOON, 330.
"LIVERPOOL" CLOTH, 400.
"LLOYD'S EUXESIS," 337.
LOCAL
and personal trade-marks distinguished, 215.
"LOCH KATRINE" WHISKEY, 452.
"LONDON
conveyance company's" omnibuses, 57.
"and Provincial Law Assurance Society, The," 88.
"Manure Company, The," 92.

"LONDON" — *continued.*
"Journal, The," 175.
"Club House" Gin, 187.
"Assurance, The," 221.
"and Westminster Assurance Corporation, Limited, The," 221.
"Dock" gin, 240.
"Society," 345.
"and County Banking Company, The," 618.
"LONE JACK" SMOKING TOBACCO, 669.
LORD BYRON,
unauthorized use of name of, 23.
LOZENGES,
marks on, 227, 532.
"LUNDY FOOT & CO.'S" SNUFF, 107.

"M. & C." WINE, 533, 567.
MACARONI,
marks on, 577.
"MACASSAR OIL," 386.
"McCARDEL HOUSE, THE," 233.
"McGOWAN BROTHERS PUMP AND MACHINE CO., THE," 406.
"MADAME LOUISE," 381.
MAGAZINE. See PUBLICATION.
"MAGIC CURE, THE," 478.
"MAGNOLIA" WHISKEY, 437.
"MAISON BOISSIER DE PARIS," 498.
"MAMMOTH WARDROBE, THE," 363.
MAN'S OWN NAME. See NAME.
"MANNY HARVESTER, THE," 412.
"MANUFACTURER AND PATENTEE," 343.
misuse by assignees of name of former, 223.
"MARK TWAIN," 429.
MARKET,
plaintiff's goods must have been a vendible article in the, 140, 215, 223, 234, 264, 301, 339.
marks on goods sent to a special, 581, 585, 646.
St. Mills Flour, 405.
"MARSHALL'S CANADA PLATES," 648.
"patent thread," 316.
"MASON" JARS, 444, 578.
MASONIC EMBLEMS,
question as to registration of, in the United States, 405, 634.

MASSACHUSETTS STATUTE
(Gen. St. c. 56) respecting trade names, 201, 283.
MASTER
responsible for fraud of servant, 321, 583.
MATCHES,
marks on, 91, 245, 485, 514.
MEDAL,
no exclusive right in a, 218, 223, 448.
registered in America, 516.
MEDICAL
man, injunction to restrain use of appellation of, 328.
practice, sale of, 28, 102, 220, 588.
preparation, 4, 18, 19, 24, 26, 31, 38, 44, 48, 59, 68, 87, 90, 93, 97, 99, 101, 103, 106, 109, 110, 180, 230, 279, 281, 288, 291, 333, 348, 376, 389, 404, 424, 458, 478, 493, 497, 502, 516, 517, 543, 562, 575, 580, 626, 628.
"MEDICATED MEXICAN BALM," 73.
"MEEN FUN" SKIN POWDER, 191.
"MENEELY'S" BELLS, 472.
MERCHANDISE MARKS ACT, 1862, THE, 267.
prosecution under, may be compromised, 457.
"MERCHANT BANKING COMPANY OF LONDON, THE," 619.
"MERRIMACK COTTON PRINTS," 134.
METAL GOODS,
marks on, 616, 621, 641.
And see CUTLERY; EDGE TOOLS; IRON; STEEL.
MILK,
marks, on, 370.
"MINNIE DALE,"
song of, 132, 136.
"MINTON" TILES, 548.
MISREPRESENTATIONS. See DEFENCE; DISENTITLED; REPRESENTATIONS.
MISSOURI,
infringement of English trade-marks criminally punishable in, 436.
MODE OF
making up bundles of silk, 217.
trial of action for infringement, 644.
"MOET'S CHAMPAGNE," 235, 533, 567.
"MOLINE" PLOUGHS, 339.
MONOGRAM PROTECTED AS TRADE-MARK, 665.
"MOORE'S PILLULES," 478.
"MORISON'S UNIVERSAL MEDICINES," 68, 110.
"MORSE'S INDIAN ROOT PILLS," 180.

MOTTO,
covenant not to use, 546.
"MRS. WINSLOW'S SOOTHING SYRUP," 291.
MUSICAL COMPOSITION, 105.
And see PUBLICATION; SONG.
MUSTARD,
marks on, 244, 579.

NAME
may become a mere ordinary transferable trade-mark, 215, 223, 257, 279, 580, 666.
not in all cases assignable as a trade-mark, 222, 223.
colorable authority to use, 76, 123, 243, 298, 390, 391, 409, 533, 534.
of celebrated person may be used as a trade-mark, 184.
of true maker, sale of goods stamped with, not restrained, 143.
of inventor of machine appropriated by another person as his trade-mark, 284.
no defence that plaintiff's was used in his mark, and has not been copied, 384.
the fact that defendant's is contained in the spurious mark is no defence, 198, 226, 269, 280, 301, 310, 329, 609, 646.
may be an element of defence, 227, 232, 251, 363, 484, 608.
right of property in, exists, 264.
but not apart from business, 312.
of house, no right of property in, apart from business, 631.
use of, not restrained, except when a right of property is concerned, 93.
on shop, use of, 107, 117, 149, 254, 268, 304, 323, 363, 381.
use of man's own restrained, where fraud exists, 106, 117, 124, 148, 333, 340, 388, 580, 668.
not restrained where no fraud, 82, 106, 117, 148, 180, 240, 257, 278, 427, 472, 521, 525, 534, 541, 573, 580.
cases reviewed and explained, 668.
whether used alone or in combination, 560.
criminally punishable, when fraudulent, 120.
in connection with a certain magazine, restrained, 259.
not restrained by reason of a sale by his assignee in bankruptcy, 575.
unauthorized use of poet's, restrained, 23.
legal author's, 49.
painter's, not restrained, 52.
not amounting to forgery, 155.
person's, as that of a director of a company, restrained, 86.
former maker's, so as to disentitle, 91.

NAME — *continued.*
unauthorized use of by purchaser of good-will restrained, 185.
of partnership held to survive, 55, 189.
passes on sale of good-will, 639.
may not be appropriated by one of the partners, 75.
by a purchaser from one of the partners, 268.
used by continuing partner where liability will be thrown upon outgoing partner, 393, 639.
changed by surviving partner while representative of deceased partner has an option of continuing in the business, 127.
of deceased or retiring partner may be used by surviving or continuing partner, if no liability will be thrown upon his estate, 7.
not be used by surviving or continuing partner if liability will be thrown upon his estate, 260.
partner may not be used by surviving partner in Massachusetts without the consent of his representatives, 201, 283.
of predecessors in business, without more, may be continued in use as trade-mark, 223, 666.
early painter, use of, no warranty, 8.
modern painter, use of, may be warranty, 56.
solicitor, agreement to allow use of, on retirement, 71.
line of omnibuses, 57.
steamships, 396.
sheriff's officer, improper use of, 438.
play, 440.
place of business may be used without fraud, 521.
proprietor of theatre, 524.
publication, copyright in, asserted, 638.
And see PUBLICATION.
company. See COMPANY.
musical composition. See MUSICAL COMPOSITION; PUBLICATION; SONG.
society. See COMPANY.
song. See SONG.
"NATIONAL
Advocate, The," 41.
"Police Gazette, The," 270.
NATURAL PRODUCTS,
marks on, 327, 354, 397, 465, 509, 529, 599, 633.
name descriptive of, cannot be appropriated, 205.
NEEDLES,
marks on, 123, 138, 251.

"NEW
Era, The," 65, 550.
"Manny Harvester, The," 412.
"York" glass, 121.
"Cutlery Company, The," 491.
NEWSPAPER,
good-will of, what is, 576.
is assets of proprietor, 3, 35, 173.
partnership, 173, 178.
is "goods and chattels" within the Bankruptcy Acts, 12, 159.
sale of, 450.
question of title to, 246.
title of, is property, 174.
rights of editor of, 39, 181, 450.
proprietor of, not disentitled by non-registration at the Stamp Office, 141.
right of publication of, incapable of seizure by a sheriff, 159.
injunction granted to restrain publication of statements as to, 162, 173.
motion to commit publisher of, 635.
And see PUBLICATION.
"NIGHT BLOOMING CEREUS," 232.
"NINETEENTH CENTURY, THE," 539.
NOM DE PLUME OF AUTHOR,
improper use of, restrained, 429.
NOMINAL DAMAGES
given for infringement of right, 50, 59, 68, 82, 99.
more than, given where specific damage proved, 83.
"NORFOLK WORKS, SHEFFIELD," 442.
"NORTHERN
Daily Express, The," 162.
"Weekly Standard, The," 162.
NOTES
on register of trade-marks, 586, 610, 611, 622, 641, 643, 654.
NOTICE
by plaintiff to defendant that he is infringing the plaintiff's rights does not alter the rights of the parties, 72.
need not be given by plaintiff to defendant before taking proceedings, 79, 81, 169, 280.
of dissolution of partnership may not be published until expiration of term, 75.
"NOURISHING STOUT," 431.

NUMERALS
as trade-marks, 53, 126, 257, 269, 302, 382, 411, 426, 522, 542, 557, 581, 585, 673.

OFFER OF SUBMISSION,
must be complete for defendant to escape paying costs, 79, 136, 169, 170, 171, 234, 235, 321, 369, 583.
OFFICIAL
mark cannot become a trade-mark, 523.
"OHIO LINIMENT," 99, 109.
OIL,
marks on, 357, 455, 486, 487, 517, 597.
"OLD LONDON DOCK GIN," 240.
"Moore's Pictorial Almanack," 86.
"OLDFIELD LANE DOCTOR, THE," 328.
OMNIBUSES,
imitation of line of, restrained, 57.
See CONVEYANCES.
OPENING LETTERS, 79, 219, 237.
OPTION
of representative of deceased partner to continue in business, protected, 127.
surviving partner to take over partnership business, protected, 215.
ORDINARY PURCHASER,
deception of, 49, 72, 91, 123, 138, 148, 154, 223, 245, 247, 256, 293, 329, 370, 379, 425, 426, 466, 541, 579, 580, 636, 650, 651, 653.
"OREGON CENTRAL RAILWAY COMPANY, THE," 318.
"ORIGINAL
The," 212, 230, 344, 346, 351, 424, 534, 602.
invention of article on which the trade-mark is used is immaterial, 91, 339, 390, 580.
trade-mark is immaterial, 138, 410, 554.
maker has no claim to inventions made in another's service, 534, 602.
"OSBORNE HOUSE," 323.
"OUR YOUNG FOLKS," 410.
"OX" MUSTARD, 244.
OYSTERS,
marks on, 625.
OYSTER SALOON,
"Live and Let Live," 330.

PACKAGE,
size, shape, and color of, not capable of appropriation, 484.
will be protected in U. S. 667, 674.

"PAIN KILLER, PERRY DAVIS'," 103, 281.
PAINTER,
use of name of early, no warranty, 8.
modern, may be warranty, 56.
not restrained, 52.
counterfeited name of, on work of art, 155.
PAINTS,
marks on, 402, 471, 511, 573.
"PARAFFIN OIL," 205.
"PARSONS' PURGATIVE PILLS, P.P.P." 404.
PARTIAL IMITATION, 100, 138, 184, 250, 256, 305, 313, 352, 379.
See COLORABLE IMITATION.
PARTIES
other than the plaintiffs interested in the marks, injunction granted though, 80, 196, 243.
PARTNERSHIP,
trade-marks of the partners become the property of the, 222, 399, 408, 437, 502, 561, 664.
may not be appropriated by one of the partners, 455, 664.
without articles, good-will of held to survive, 9.
not to survive, 14, 64, 139, 165, 185.
good-will of, held to be assets, 16, 64, 70, 139, 165, 176, 177, 185, 192, 202, 206, 210, 215, 248.
to survive to surviving partner under the articles, 139, 208.
medical, held to survive, 28.
newspaper is assets of, 173, 178.
name of, held to survive, 55, 189.
pass on sale of good-will, 639.
may not be appropriated by one of the partners, 75.
by a purchaser from one of the partners, 268.
used by continuing partner, when liability will be thrown upon out-going partner, 393, 639.
changed by surviving partner while representative of deceased partner has an option of continuing in the business, 127.
deceased or retiring member of, may be used by surviving or continuing partner, if no liability will be thrown upon his estate, 7.
may not be used by surviving or continuing partner, if liability will be thrown upon his estate, 260.
member of, may not be used by surviving partners in Massachusetts without the consent of his representatives, 201, 283.
sale of one partner's interest in name and trade-mark of, refused, 231.

PARTNERSHIP — *continued.*
rights of part owner of business purchasing the remaining interests, 162, 479.
premises, specific transfer of share of good-will of, under legacy, not enforced, 189.
agreement for dissolution of, and purchase of the practice, 71.
notices of dissolution of, may not be published until expiration of term, 75.
rights of partners on dissolution of, 37, 122, 149, 156, 172, 173, 176, 177, 180, 202, 206, 207, 210, 215, 238, 248, 260, 368, 383, 393, 406, 408, 437, 455, 548, 561, 566, 585, 639, 664.
value of deceased or retiring partner's interest in good-will of how ascertained, 70, 156, 158, 176, 177, 206, 208, 215, 238, 248, 260, 451.
retiring member of, compelled to quit trade altogether, 5.
in a certain locality, 25, 29, 172.
specific performance granted of agreement between solicitors on dissolution of, 135.
"property, credits and effects," good-will held not to be included in, 129.
"stock in trade and effects," nor in, 129.
"premises, stock in trade," etc., nor in, 208.
"stock in trade, goods, chattels and effects," nor in, 260.
"estate and effects," as ascertained by annual valuation, nor in, 605.
"stock belonging to the," good-will held to be included in the, 215.
"premises and effects," and in, 350.
"effects and things," and in, 614.
"property and effects," and in, 615.
PATENT,
trade-mark distinguished from, 84.
plaintiff disentitled by improper use of the word, 116, 223, 267, 288, 324, 343, 444, 528.
not disentitled by improper use of the word, 40, 119, 142, 214, 267, 304, 316, 384.
disentitled by improper use of marks on articles made under, 167.
article may be stated to be made according to expired, 119, 205, 322, 416, 474, 528, 578.
when name applied to goods made under, may be generally used, 205, 474, 528, 536, 561, 578.
"Plumbago Crucibles," 267.
word descriptive of *publici juris*, 659.
"PECTORINE" 458.
PENCILS,
marks on, 278, 481.

PENS,
marks on, 126, 269, 568, 610, 611, 637.
"PEPPER'S EXTRA SIGNAL OIL," 455, 487.
PERFUMES,
marks on. See TOILET.
"PERRY'S MEDICATED MEXICAN BALM," 73.
"PERRY DAVIS' PAIN KILLER," 105, 281.
"PERSIAN THREAD," 78, 83, 84, 124.
PERSONAL,
a trade-mark may be so, as to be incapable of assignment or use by assignee, 222, 223, 521, 575.
and local trade-marks distinguished, 215.
assets, trade-mark is, 80, 215, 337.
good-will of newspaper is, 3.
shop is, 3, 58.
public house is, 6.
partnership is, 16, 64, 70, 139, 165, 176, 177, 185, 192, 202, 206, 210, 215, 248.
legal practice is not, 46.
medical practice held to be to some extent, 102.
held not to be, 588.
"PESSENDEDE" WATCHES, 51.
"PHARAOH'S SERPENTS," 253.
"PHELAN AND COLLENDER'S" BILLIARD TABLES, 479.
"PHOTOGRAPHIC NEWS, THE," 181.
PIANOFORTES,
marks on, 525.
PICKLES,
marks on, 274.
And see SAUCES.
"PICTORIAL,"
the word, cannot be exclusively appropriated, 85.
"Almanack, The," 85.
PICTURE. See PAINTER.
"PIG BRAND" LARD, 425.
"PIKE'S MAGNOLIA WHISKEY," 666.
PILLS,
marks on, 93, 106, 180, 404, 478, 580.
PINS,
marks on, 119.
PIPES,
marks on, 243.
PISTOLS,
marks on, 249.

PLOUGHS,
marks on, 53, 339, 596.
PLUMBAGO CRUCIBLES,
marks on, 267.
POET,
unauthorized use of name of, restrained, 23.
"POROUS PLASTERS," 626.
PORTER,
marks on. See BEER.
"PORTER'S SPIRIT OF THE TIMES," 178.
POTTERY,
marks on, 96.
"PRAIRIE FLOWER" CIGARS, 433.
"PRESCOTT HOUSE" HOTEL, 266.
PRICE
of spuriously marked goods recovered by innocent vendors, 101.
"PRIME LEAF LARD," 425.
"PRINCE'S METALLIC PAINT," 573.
PRINCIPAL
responsible for fraud of agent, 321.
PRINCIPLES
on which infringement of trade-marks is prohibited, 73, 76, 84, 91, 100, 108, 109, 124, 126, 130, 145, 154, 213, 215, 223, 269, 270, 302, 320, 325, 329, 340, 354, 407, 413, 466, 477, 580, 649.
protection is given in cases of trade name, 325, 477, 639.
of construction, names indicative of, 322, 413, 477, 528.
And see PROCESS OF MANUFACTURE.
PRINTERS,
infringement by, 113, 130.
rollers, marks on, 630.
PRIZE MEDAL,
no exclusive right in a, 218, 223, 448.
registered in America, 516.
PROCESS OF MANUFACTURE,
marks indicative of, 286, 388, 536, 560.
And see PRINCIPLES OF CONSTRUCTION.
PROFESSION,
good-will of, distinguished from good-will of trade, 156, 588.
PROFESSOR,
false assumption of title of, held not to disentitle, 106.
PROPERTY,
jurisdiction of court to prevent injury to, by injunction, 197, 223.
right of, in trade-mark denied, 73, 130.

PROPERTY — *continued.*
right of in trade-mark asserted, 106, 121, 145, 174, 213, 215, 223, 249, 253, 257, 320, 329, 354, 413, 477, 541.
not limited by territorial bounds, 249.
in man's name asserted, 264.
but not apart from business, 312.
in name of house cannot exist apart from business, 631.
in prize medal denied, 218.
PUBLIC,
fraud on the, is no ground for an injunction, 7, 455, 487, 639.
is ground for refusing an injunction, 143.
damages for breach of contract, 146.
specific performance of contract, 209.
what is. See ORDINARY PURCHASER.
mere continued use of name of predecessor in business as trade-mark is not, 223.
imposition on the, is the test of infringement, 215, 223.
house, good-will of, is personal assets, 6.
" PUBLIC CORRESPONDENT, THE," 246.
PUBLICATION,
name of, right of property in, asserted, 174.
but only after actual issue, 264.
copyright in asserted, 638.
not protected by registration as copyright, 246, 265, 292.
infringement of, what is, 34.
restrained, 10, 15, 17, 33, 34, 39, 141, 173, 174, 175, 270, 317, 345, 403, 420, 587, 638.
not restrained, 41, 65, 246, 264, 265, 295, 320, 410, 503, 539, 550.
And see NEWSPAPER; SONG.
" PUNCH," 320.
PURCHASER,
deception of. See ORDINARY PURCHASER.
" PYRETIC SALINE," 288.

QUALITY,
marks merely indicative of, cannot be appropriated, 59, 85, 100, 121, 187, 226, 232, 236, 269, 279, 289, 339, 410, 431, 541, 557, 581, 626.
And see COMMON MARKS; DESCRIPTIVE WORDS.
trade-marks varying to denote, 339, 342, 367, 400, 636, 650, 651.
transfer of marks indicative of one quality to goods of another restrained, 126, 253, 441, 549, 556, 650, 651.
equality of, no defence, 50, 83, 84, 109, 213.
inferiority of, no ground of action where name used is common, 59, 91.

QUESTIONS FOR THE JURY, 49, 56, 72, 82, 92, 120, 167, 338, 648.
as to construction of contracts for supply of goods, 216, 648.
of title. See TITLE.

"RADSTOCK" COAL, 599, 633.
RAILWAY COMPANY,
name of, 318.
"RAMSAY" FIRE-BRICKS, 194.
"RANSOME'S PATENT" PLOUGHSHARES, 53.
"RAZOR STEEL," 362.
"READING SAUCE," 351.
"REAL JOHN BULL, THE," 33.
RECTIFICATION OF REGISTER. See REGISTRATION (OF TRADE-MARKS IN ENGLAND).
"REEVES & CO." 368.
"REGISTERED,"
the word, will not be registered in England, 515.
REGISTRATION
at Stamp Office, proprietor of newspaper not disentitled by want of, 141.
as copyright, name of newspaper not protected by, 246, 265, 292.
as design described as patent, 304.
of trade-marks in England, under the Trade-Marks Registration Acts, 1875-6-7.
question as to, how to be tried, 569.
to be tried by special case, 535.
motion, 505, 598.
action, 569.
adjourned summons, 601.
advertisement a necessary preliminary to, 515.
of two identical old marks, 589.
of old marks for part of a class, 555, 616, 623, 643.
up to three, but not more, 558, 589, 610, 611, 616.
of new marks for part of a class, refused, 645.
up to three, with consent, but not otherwise, 558, 645.
granted in a representative form, 540, 622.
with limitation as to mode of user, 641, 654.
locality of user, 643.
after refusal in Germany, 642.
subject to perfection of title with Cutlers' Co. 643.
notwithstanding allegations of similarity, 592, 597.
prohibition of Commissioners of Patents, 647.

REGISTRATION — *continued.*
of trade-marks in England, under the Trade-Marks Registration Acts, 1875-6-7.
directed to proceed, though the marks were placed in the second class by the Committee of Experts, 632.
refused to words adopted since the Act, 510.
word "Registered," 515.
a single letter, 568.
marks too similar, 545, 616, 621, 642.
marks used by more than three makers, 593.
marks previously used in one class as new marks in another, 616.
a new mark for a class of goods for part of which alone an old mark was registered, 655.
deceptive or descriptive words, 625.
descriptive words, 626.
notes appended to, 586, 610, 611, 622, 637, 641, 643, 654.
notice to be given to registrar of opposition to, 601.
rescinded on application of proprietor, 620.
as to part of a class, 623.
rectified on application of proprietor, as to the address, 624.
rectification of, by transfer to a new name, refused, 630.
rectification of, by expunging wrongful entry, granted, 630.
question as to similarity of marks offered for, to be determined by appearance in actual use, 616, 621.
in breach of contract, injunction granted to restrain, 530.
costs of questions as to, 593, 616, 621, 626, 637.
position of Commissioners of Patents with respect to, 515, 540, 647.
Committee of Experts with respect to, 586, 622, 632.
injunctions granted to restrain infringement of registered marks, 495, 609.
to restrain infringement of unregistered marks, 583, 646.
of trade-marks in America, under the United States Act of 1870 (Revised Statutes, sections 4937–4947).
is a proper mode of obtaining the exclusive use of a mark, 341, 380, 446, 508, 544.
not to be granted to a design, 582.
for too wide a class is bad, 402.
not necessary to entitle to remedy for infringement, 352.
gives no right against valid old marks, 511.
Commissioner's certificate of, not conclusive as to validity of mark, 373.

REGISTRATION — *continued.*
of trade-marks in America, under the United States Act of 1870 (Revised Statutes, sections 4937–4947).
cannot be cancelled, though wrongful, 399.
separate applications for, held to be necessary, 342.
declaration on oath as to the right to the mark must be filed, 401.
must be made in substance, 469.
in the name of a firm, and not in the names of the individual partners, is good, 402.
for "paints" generally, is good, 402.
claim for "alcoholic spirits" is good, 470.
claim for "fancy goods" is too general, 600.
essential and non-essential parts must be distinguished on application for, 468.
only one *fac-simile* showing mode of use need be produced on application for, 553.
fees paid upon application for, only recoverable in case of genuine mistake, 584.
in questions of, all matters relating to the ownership of the mark to be investigated, 627.
position of Commissioner of Patents with respect to, 373, 525.
jurisdiction of United States Circuit Courts with respect to registered trade-marks, 613, 629.
granted, notwithstanding objections, 342, 358, 359, 360, 361, 371, 375, 471, 473, 497, 518, 525, 563, 565.
notwithstanding prior registration by another, 417.
to name of person, firm, or corporation, as an old mark, 358, 476, 507.
numerals, 382, 557.
alternative marks, 394, 501, 544.
device of a crown, 402.
form of carpet-stick, 428.
mark invented, but not actually used, 456, 627.
geographical mark, 565.
masonic emblems, 634.
refused to descriptive marks, 357, 362, 376, 377, 378, 412, 416, 422, 504, 612.
figures, 527.
geographical marks, 399, 405.
masonic emblems, 405.
deceptive or descriptive marks, 422, 493, 571, 577.
mark not used on "goods or merchandise," 464.
marks too similar to others, 486, 490, 506.

REGISTRATION — *continued.*
of trade-marks in America, under the United States Act of 1870 (Revised Statutes, sections 4937–4947).
refused to name of corporation as a new mark, 491.
numerals, 522.
name of patented article, 578.
formerly patented article, 416.
mark become common, 596.
hoops on barrels, 480.
collar-box, 538.
strip of leaf-tobacco, 572.
infringement of registered mark must be on goods of the same kind, 430.
RENEWAL
of genuine marks on genuine goods is legitimate, 130.
REPRESENTATIONS,
trade-marks containing false, cannot be acquired, 223.
plaintiff disentitled by his own false, 60, 73, 90, 91, 133, 144, 191, 223, 232, 267, 308, 418, 434, 562, 575, 628.
however apparent they may be, 223.
not disentitled by his own false, 10, 106, 132, 136, 180, 195, 276, 323, 325, 348, 483, 587, 591.
when merely collateral, 291, 384.
that one man is carrying on another's business, 237, 247, 268, 272, 297, 304, 323, 541.
REPRESENTATIVE REGISTRATION, 540, 622.
RESTRAINT OF TRADE,
retiring partner compelled to quit trade altogether, 5.
in a certain locality, 25, 29, 172.
vendor of good-will of business restrained from trading in a certain locality, 36, 114, 168, 303.
using old firm name, 272, 484.
solicitor's practice restrained from practising in Great Britain, 66.
trade secret restrained from using secret, 36.
one of two partners restrained from monopolizing a part of the business after dissolution of partnership, 202.
contract by attorney to retire from practice, etc., good in law, 11.
specific performance of, not enforced, 22.
See GOOD-WILL; PARTNERSHIP.
"REVERE HOUSE, THE," 111.
RIGHT OF PROPERTY
in trade-mark denied, 73, 130.

RIGHT OF PROPERTY — *continued.*
in trade-mark asserted, 106, 121, 145, 174, 213, 215, 223, 249, 253, 257, 320, 329, 354, 413, 477, 541.
infringement of, nominal damages given for, 50, 59, 68, 82, 99.
"RISING SUN" STOVE POLISH, 445.
"ROBERTS' RAZOR-STEEL SCISSORS," 359.
"diamond-edged razors," 360, 361.
"RODGERS' CUTLERY," 82, 115, 352, 442.
"ROGER WILLIAMS" LONG CLOTH, 184.
"ROSE & CO.'S" LIME JUICE, 551, 608.
"ROYAL" BAKING POWDER, 656.
flavoring extract, 656.
"RUBBER CLOTHING COMPANY, THE," 507.

"S. & H. (CROWN)" IRON, 216.
"S. P." SNUFF, 620.
SAFES,
marks on, 255.
"ST. JAMES'
Evening Post, The," 3.
"Chronicle, The," 159.
cigarettes, 542.
SALE OF MARK, with place of manufacture, lawful in U. S. 666.
SALERATUS,
marks on, 448.
SAUCES,
marks on, 117, 160, 169, 170, 344, 346, 351, 407, 436, 447, 513, 526, 589.
SCANDAL,
exceptions for, 414.
"SCHIEDAM SCHNAPPS," 179, 390, 415, 434, 653.
SCHOOL APPARATUS,
marks on, 263.
"SCHWEITZER'S COCOATINA," 298.
"SCHWEPPE'S SODA WATER," 157.
SCOTCH CASES, 34, 35, 39, 94, 227, 262, 413, 438, 452, 588.
practice as to interim interdict, 262.
"SCOTT'S COMMENTARY ON THE BIBLE," 67.
SEALING-WAX,
marks on, 593.
SECRET OF TRADE. See TRADE SECRET.
"SEFTON" CLOTH, 400.
"SEIXIO" WINE, 256.

SELECTION,
trade-mark may be used to denote, 494.
"SERIOUS FAMILY POLKA, THE," 105.
SERVANT,
rights of, on leaving employment. See FORMER EMPLOYMENT.
master responsible for fraud of, 321.
SEWING-MACHINES,
marks on, 203, 284, 322, 413, 459, 477, 569, 635.
SHEFFIELD CUTLERS' MARKS, 222, 621, 643.
SHERIFF'S OFFICER,
improper use of name of, 438.
SHIRTINGS,
marks on, 411.
SHIRTS,
marks on, 384, 394.
SHOP,
name on, 107, 117, 149, 254, 268, 304, 323, 336, 381, 398.
SHOWBOARD,
use of name on, 107.
"SHRIMPTON & HOOPER'S" NEEDLES, 123.
SIGNATURE
as trade-mark, 130, 188, 560, 642, 654.
SILK,
marks on, 217, 571.
"SILVER GROVE" WHISKEY, 374.
"SIMMONS' LIVER MEDICINE," 348.
SINGER,
breach of contract by, restrained, 112.
sewing-machines, 413, 477, 659, 672.
"SINGLETON'S GOLDEN OINTMENT," 389.
SLANDER. See LIBEL.
"SLATE ROOFING PAINT," 471.
"SMYTH'S BOND STREET" BRUSHES, 81.
SNUFF,
marks on, 107, 620.
SOAP,
marks on, 150, 225, 226, 280, 563, 565, 657.
SOCIETY,
name of. See COMPANY.
SODA WATER,
marks on, 157.
SOLICITING CUSTOMERS
restrained, 114, 141, 207, 385, 566.

SOLICITOR'S
name, agreement to allow use of, on retirement, 71.
practice, sale of, 66.
practice, what is the good-will of, 156.
specific performance granted, of agreement between, on dissolution of partnership, 135.
See GOOD-WILL; PARTNERSHIP.
SONG,
name of, 132, 136.
distinguishing characteristics of, 132.
statement as to authorship of, 293.
SOUP,
marks on, 461.
"SOUTHORN'S BROSELEY PIPES," 243.
SPIRITS,
marks on, 179, 187, 228, 240, 332, 366, 372, 373, 374, 395, 415, 432, 434, 437, 452, 483, 531, 544, 549, 556, 591, 650, 651, 652, 653.
SPOONS,
marks on, 302.
"SPORTING LIFE, THE," 292.
"SPRATT'S DOG BISCUITS," 488, 644.
SPURIOUSLY MARKED GOODS,
price of, recovered by innocent vendors, 101.
not protected at the expense of the genuine, 143, 209.
action for damages occasioned by order for, 194.
delivery-up of, for erasure, 196, 211.
to indorsee of dock warrants, after erasure, 229.
refused by wharfingers, 239.
question as to lien on, for costs, 369, 567.
"STANDARD, THE," 159.
"STAR'
iron, 271.
shirts, 394.
pencils, 481.
oil, 486.
soap, 563.
STARCH,
marks on, 329.
"STARK" BAGS, 365.
"STATION HOTEL, THE," 520.
STEAMSHIPS,
name of line of protected, 396.
STEEL,
marks on, 63, 151, 152, 164, 171, 222. See IRON.

"STEPHENS' BLUE-BLACK WRITING FLUID," 273.
"STILLMAN MILL," 521.
STOCKINGS,
marks on, 80.
"STONEBRAKER'S MEDICINES," 333.
STOVE POLISH,
marks on, 331, 445.
STOVES,
marks on, 313.
STYLE OF PACKAGE
will be protected, 667, 674.
SUBMISSION,
offer of, by defendant must be complete for him to escape paying costs, 79. 136, 169, 170, 171, 234, 235, 321, 369, 583.
"SUCCESSOR
to E. H. Reeves & Co." 368.
"to Phelan & Collender," 479.
"SULPHATE OF QUININE," 44
"SUPERFINE, SUPERIOR,"
the words, cannot be appropriated, 226.
"SWAN" GIN, 544.
"SWEET OPOPONAX OF MEXICO," 276.
"SYKES' PATENT" SHOT BELTS, 40.
SYRUP,
marks on, 334.

"T. H. H." IRON, 555.
"TAMAR INDIEN," 532.
"TANNED PATENTED" LEATHER CLOTH, 214, 223.
"TASTELESS" DRUGS, 493.
"TAYLER & CO.'S PATENT SOLID-HEADED PINS," 119.
"TAYLOR'S PERSIAN THREAD," 78, 83, 84, 124.
TEA,
marks on, 60, 379, 484, 515, 603.
"TEMPLE BAR," 259.
TERRITORIAL BOUNDS,
right of property in trade-mark not limited by, 149.
TEST OF INFRINGEMENT,
imposition on the public is the, 215, 223.
TESTIMONIALS,
improper use of another's, restrained, 87, 333.
"THEATRE, BOOTH'S," 524.
"THOMPSON'S EYE WATER," 101.
"THOMSONIAN MEDICINES," 59.

"THORLEY'S FOOD FOR CATTLE," 560.
THREAD,
marks on, 78, 79, 83, 84, 124, 142, 148, 190, 195, 257, 316, 519, 622.
"THRESHER & GLENNY, FROM," 247.
TILES,
marks on, 548.
TIN PLATES,
marks on, 61, 648.
TITLE,
plaintiff's, must be clear for injunction to be granted, 134, 145, 191, 246, 284, 374, 391, 410, 487, 492, 494, 512.
to trade-mark cannot be acquired from a person who has already sold his right, 367, 502.
question as to, between successive lessees of same works, 61, 193.
lessor of mines of fire-clay and lessees of fire-brick works, 193.
landlord and tenant of hotel, 212, 233.
exporter and manufacturer, 585.
cannot be tried by Committee of Experts at Manchester, 632.
of musical composition. See MUSICAL COMPOSITION.
TOBACCO,
marks on, 299, 308, 369, 392, 399, 433, 466, 492, 494, 512, 542, 553, 557, 572, 590, 595.
"TOD" WATCHES, 647.
TOILET,
marks on preparations for the, 73, 113, 118, 130, 133, 144, 145, 163, 191, 232, 275, 319, 335, 337, 350, 353, 378, 386, 418, 592, 642, 654.
"TONGE'S" CLOTH, 321.
"TOUCHSTONE," 550.
TRADE-MARK,
what is a, 215, 223, 300, 327, 541, 580.
common, descriptive or quality marks are not. See COMMON MARKS; DESCRIPTIVE WORDS; QUALITY, MARKS INDICATIVE OF.
fancy names, foreign words, initials, numerals, may be. See FANCY NAMES; FOREIGN LANGUAGE; INITIALS; NUMERALS.
special form of barrel is no, 373.
may be an important element in, 395.
hoops on barrels are no, 480,
collar-box is no, 538.
strip of leaf tobacco is no, 572.
in an alternative shape, 394, 501, 544.
name of inventor appropriated by another person as his, 284.
may consist of a new combination of letters, 277.

TRADE-MARK — *continued.*
may consist of a new use of old words, 282.
varying to denote quality, 339, 342, 367, 400, 636, 650, 651.
official mark cannot become, 523.
difficult to claim in name of new article, 536, 591.
connection between trade name and, 172.
good-will and, 91, 168, 331, 350, 630.
copyright and, 105.
distinguished from trade name, 201.
patent, 84.
copyright, 84, 97, 130, 152, 246, 265, 325.
into local and personal, 215.
compared with name of hotel, 108.
held to be either deceptive or descriptive, 232, 422, 493, 571, 577, 625.
trade name may become a mere impersonal, 223, 279.
may be used to denote selection, 494.
is a chattel within the Bankruptcy Act, 1869, 537.
indicating goods dealt with by three firms, 585.
use of, limited to a particular locality, 628.
attached to certain works, 61.
moulded into bottles. See BOTTLES.
questions as to title to. See TITLE.
right of property in, denied, 73, 130.
asserted, 106, 121, 145, 174, 213, 215, 223, 249, 253, 257, 320, 329, 354, 413, 477, 541.
is personal assets, 80, 215, 337.
bequeathed to different persons by will, 196.
renewal of genuine on genuine goods is legitimate, 130.
cannot be severed from good-will, 331, 447, 487, 492, 630.
may be partly purchased and partly invented, 367.
name may become mere ordinary transferable, 215, 223, 279.
can only be acquired in connection with a particular class of goods, 215, 223, 234, 257, 555, 559, 616.
acquired by long user, 51, 459.
without long user, 215, 234, 325, 364, 456, 627, 629.
cannot be acquired in gross, 447, 487, 492, 630.
except by the previous maker of the goods, 492.
of partners becomes the property of the partnership, 222, 399, 408, 437, 502, 561.
of partnership cannot be appropriated by one of the partners, 455.
not in all cases assignable, 222, 223, 521.
assignment of, without direct mention, on sale of good-will, 350, 354, 492.

TRADE-MARK — *continued.*
cannot be twice assigned by the same person, 367, 502.
lost by becoming common to a trade, 263, 593, 610, 611, 637.
sale of part interest in refused, 231.
principles on which infringement of is prohibited. See PRINCIPLES.
not required to be completely changed where used *bonâ fide*, 310.
See ABANDONMENT; ASSIGNMENT; COLORABLE IMITATION; CUTLER'S MARK; INFRINGEMENT; INJUNCTION; NAME; PARTNERSHIP; REGISTRATION.
TRADE-MARKS REGISTRATION ACT, 1875, § 6,
explained, 597.
TRADE NAME, 7, 172.
connection between trade-mark and, 172.
distinguished from trade-mark, 201.
may become a mere impersonal trade-mark, 223.
the same, used by two firms, 283.
not in all cases assignable, 223.
may not be appropriated by some of the partners, 75, 122, 149, 166, 248.
a purchaser from one of two partners, 268.
changed by surviving partner while personal representative of deceased partner has option of continuing in the business, 127.
is assets, 248.
held not to pass on sale of good-will, 185.
held to pass on sale of good-will, 248, 639.
sale of part interest in refused, 231.
principles on which protection is given in cases of, 325, 477, 639.
actual fraud unnecessary for infringement of, if deception probable, 477.
breach of contract in respect of restrained, 485.
Massachusetts General Statute respecting, 201, 283.
See GOOD-WILL; INJUNCTION; NAME; PARTNERSHIP.
TRADE SECRET
is personal assets, 3.
use of restrained, 31, 36, 110, 163, 290, 517, 604.
not restrained, 19, 24, 26, 517, 591, 628.
trusts of enforced, 38.
specific performance of agreement for sale of enforced, 36.
damages given for breach of agreement to sell, 62.
ascertainment of value of, 38.
sale of, by assignee in bankruptcy, does not deprive bankrupt of his right to use it, 575.

TRADE SECRET — *continued.*
trade-mark not to be used by persons unacquainted with, 447.
except as against persons who have no better right in the mark, 455.
TRANSFER
of marks indicative of one quality to goods of another, 126, 253, 441, 549, 556, 650, 651.
TRANSFERABLE TRADE-MARK,
name may become mere ordinary, 215, 223, 279.
TRANSMISSION
of trade-marks on bankruptcy, 222, 323, 447.
of good-will on bankruptcy, 69.
of trade-marks of partnership, 399, 408, 437.
"TRIAL
and Triumph," 638.
of action for infringement, mode of, 644.
"TRIANGLE BEER," 655.
TRUST,
breach of, in respect of trade secret, restrained, 31, 110.
etchings, restrained, 98.
TRUSTS
of trade secret enforced, 38.
of good-will enforced, 74.
"TUCKER SPRING BED, THE," 474.
"TURIN" CLOTH, 400.
TURKISH LETTERS,
word in, used as trade-mark, 51.
"TWO ELEPHANT" YARN, 646.
TYPE,
deception aided by use of special, 317.
And see LETTERS.

UNFAIR REPORT
of proceedings in a trade-mark case, injunction not granted to restrain publication of, 190.
"UNITED
Service" soap, 280.
States Act of 1870, held to be invalid, 629, 658.
registration under, held not to be compulsory, 352.
Circuit Court, jurisdiction of, in cases of registered trade-marks, 613, 629.
UNPATENTED ARTICLE,
no exclusive right in, 3, 4, 19, 59, 68, 84, 99, 103, 130, 388, 389, 416, 461, 591, 628.

UNWARY PURCHASER. See ORDINARY PURCHASER.
USER,
acquisition of trade-mark by long, 51, 459.
without long, 215, 234, 325, 364.
question as to insufficiency of, 88, 92, 246.
registration granted, with limitation as to mode of, 641, 654.
locality of, 643.

"VALLEY" WHISKEY, 395.
VALUE
of deceased, or retiring partner's interest in good-will of partnership, how ascertained, 70, 156, 158, 176, 177, 206, 208, 215, 238, 248, 260, 451.
of good-will of public house, how ascertained, 462.
"VALVOLINE" OIL, 597.
"VANITY FAIR" CIGARETTES, 553, 595.
VEHICLES,
imitation of line of, restrained, 57.
use of name of hotel on, 104, 111, 266.
"VELNO'S VEGETABLE SYRUP," 19.
VENDIBLE
article in the market, plaintiff's mark must have been placed on a, to support an action, 140, 215, 223, 234, 264, 301, 339.
VENDOR
of trade-mark cannot resell, 367, 502.
price of spuriously marked goods recovered by innocent, 101.
VICTORIA
cases, 517, 649, 650, 651, 652, 653.
lozenges, 227.
"VOLDNER'S SCHIEDAM SCHNAPPS," 179.

"WAMSUTTA" MUSLIN, 660.
WARRANTY
not implied by use of name of early painter, 8.
may be implied by use of name of modern painter, 56.
WASHING POWDER,
marks on, 296.
WATCHES,
marks on, 51, 196, 211, 647.
WATER
pipes, marks on, 612.
marks on mineral, 354, 465, 509, 529, 558.
"WATERTOWN WEEKLY RE-UNION, THE," 576.
"WAYNE" GLASS, 121.

"WEDGWOOD" POTTERY, 96.
"WESTLEY RICHARDS" GUNS, 441.
"WESTON'S WIZARD OIL," 517.
WHARFINGERS'
lien, 369, 567.
"WHAT CHEER HOUSE, THE," 212.
"WHEELER & WILSON'S" SEWING-MACHINES, 322.
WHISKEY,
marks on. See SPIRITS.
WHITE LEAD,
marks on, 402, 511.
"WILDER & CO.'S STOMACH BITTERS," 372.
WILL,
trade-mark bequeathed to different persons by, 196.
WINE,
marks on, 229, 235, 239, 256, 506, 533, 537, 567.
WIRE,
marks on, 213.
"WISTAR'S BALSAM OF WILD CHERRY," 90.
"WM. ASH & CO.'S" STEEL, 222.
"WOLFE'S SCHIEDAM SCHNAPPS," 179, 390, 415, 434, 653.
"WONDERFUL MAGAZINE, THE," 10, 15, 17.
"WOOD'S HOTEL," 467.
WOOLLEN YARNS,
marks on, 601.
"WORCESTERSHIRE SAUCE," 407, 436, 513.
"WOTHERSPOON'S VICTORIA LOZENGES," 227

"X BROOMS, ENGLISH'S," 342.

"YANKEE SOAP," 150, 225.
YEAST POWDER,
marks on, 664.
"YORKSHIRE RELISH," 526.

"ZINGARI" BOUQUET, 350.

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